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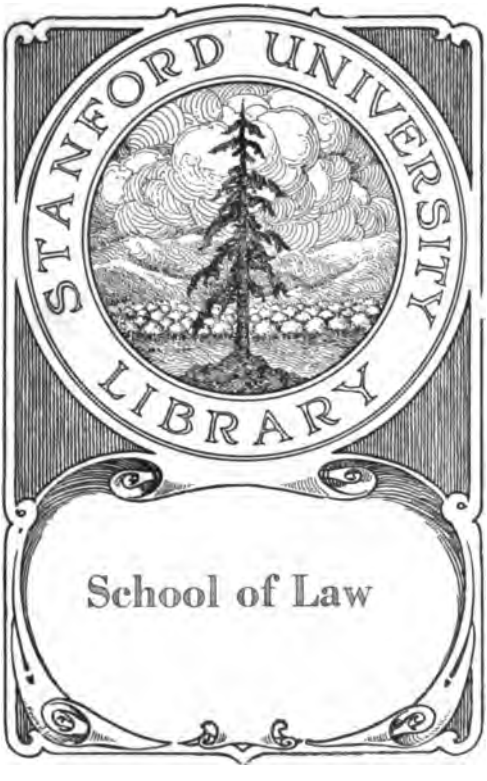
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1. Mon..New Year's Day. Municipal election. Heir and Devisee sittings begin. County Court Term begins.
2. Tues..Toronto Assizes (Criminal Court), Wilson, J.
3. Wed..Gretna Green marriages abolished, 1857.
6. Sat...:Epiphany. County Court Term ends. Chancery Christmas vacation, and vacation for Judges Queen's Bench and Common Pleas sittings singly ends.
7. SUN..1*st Sunday after Epiphany.*
8. Mon..Hamilton Assizes.—Harrison, C.J.
10. Wed..Postal cards first Introduced into England, 1870.
11. Thur..Toronto Assizes (Civil Court) —Wilson, J.
12. Frid..Sir Charles Bagot, Governor-General 1842,
14. SUN..2*nd Sunday after Epiphany.*
15. Mon..Municipal Councils (ex County Council) holds first meeting.
16. Tues..Heir and Devisee sittings end.
21. SUN..3*rd Sunday after Epiphany.*
23. Tues..County Councils holds first meeting. Law Society Primary Examinations.
28. SUN..*Septuagesima.*
30. Tues..Law Society, 1st Intermediate Examinations.
31. Wed..Earl of Elgin, Governor-General, 1847. 2nd Intermediate Examinations.

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THE
Canada Law Journal.
Toronto, January, 1877.

In view of the recent disturbances on the Grand Trunk Railway, a decision of the Supreme Court of Illinois, reported in the Chicago *Legal News*, is not devoid of interest. Regarding the responsibility which arose from delay in transporting freight, the Court laid it down that the company is responsible for the delay resulting from the refusal of the employees of the company to do their duty; but otherwise when the delay was attributed to the lawless violence of men not in the employment of the company. We print the opinion of the Court (from which three Judges dissented) in full in another place.

Armour v. *Usborne* referred to in our last has been reheard, but decides nothing except that where a plaintiff serves a bill endorsed with the special endorsment for foreclosure, mentioned in Sched. S. of the Con. Orders, and makes no mention therein of his intention to apply for the additional relief of a personal order for payment, &c., that such additional relief will not be granted on a hearing *pro confesso*, even though expressly prayed for in the bill. The full Court adopted the view of Blake, V.C., that a special endorsement might have the effect of misleading a defendant. What is the proper form of a decree of foreclosure, where a personal order for payment is granted, seems therefore to be still unsettled.

The *Law Times* calls upon the Council of Law Reporting to call in the Digest that has just been issued, on the ground that it is utterly useless, and of a most mischeivous tendency. This is certainly not "damning it with faint praise." A

correspondent of the same journal also says, that "a more worthless good-for-nothing work was never inflicted upon the profession." He might have made the same remark as to the Digest at the end of each volume of these reports. The compiler, if a lawyer at all, is singularly devoid of the organ of analysis. It is not given, however, to every man, even to make the simplest index, and many books, in themselves mines of learning, are in a great measure useless from incapacity on the part of the subordinate to whom the making of the index is often thoughtlessly entrusted.

The Attorney, Solicitor, Notary Public, Conveyancer and Commissioner, (also a B. A.) whose card, published in a Paisley paper, some time ago attracted our attention, still implores the public to believe of him, that, "N.B.—All suits in Superior Courts of Law attended to with promptness" (*sic*). We really must ask our brother to be at ease in his mind. Even if he has heretofore (of which we are ignorant) been dilatory in suits in the "Superior Courts of Law,"—we are sure it must have been forgotten by this time; why perpetuate the memory? Besides, he can comfort himself with the thought that he does not seem to have been accused of want of promptness in suits in the "Superior Courts" of *Equity*. He should, however, not forget the maxim "*Expressio unius, &c.*" What about the Inferior Courts of Law, or Equity? There is a hideous silence in the advertisement on this point.

We have seen many unprofessional advertisements, and have never failed to express a decided opinion upon them. We have also heard of attorneys advertising coals for sale; but it has remained for a firm of attorneys in a western city in Canada to aid an official assignee to "run off at once" the stock of an insolvent, "at prices regardless of cost." Surely the attorneys in question, who are said to do a large and respectable business (to a great extent collections) are not aware that their names are appended to a printed notice, said to have been addressed to a debtor of the insolvent, which reads as follows:

"Insolvent Estate of Jerry Robinson.—"London, December, 1876.—The stock of the above Insolvent is now selling at prices regardless of cost, as it must be run off at once. We find you are indebted to the above estate to the amount of $56.59. You are requested to settle at once with Mr. D. McMonnies, at the old stand, so as to save costs, as all accounts not paid by 31st December, will be placed in court.

"Yours respectfully,

"&c., &c.,

"Attorneys."

CONTEMPT OF COURT—THE QUEEN v. *WILKINSON.*

We would fain make no reference to a suit which is said to bring up questions of party politics, but it would be affectation in a legal journal to ignore the judgments recently delivered in *Regina* v. *Wilkinson*, by the Chief Justice and Mr. Justice Morrison, involving as they do matters of great professional interest which it is our duty to notice.

It must always be a subject of regret, to see—as we have seen—the Court of Queen's Bench divided against itself in a matter so important on public grounds and of such vital interest to the welfare of the Bench. We must regret that on every material point the opinions of the two learned Judges were in direct opposition; and we must still say this whether we accept the judgment of the Chief Justice, powerful in its reasoning on the legal points and facts involved, and true to judicial traditions in its assertion of the majesty of the law and the dignity of Bench; or the judgment of Mr. Justice Morrison, who held—and we

have less to find fault with in what he said than what he left unsaid—that no contempt should be punished, which is not brought before the Court forthwith, either by the Attorney-General or by the person aggrieved, and only by the latter when his case is likely to be prejudiced; or which the Court does not itself, at the time the offence was committed, think proper to take notice of, (even though the contempt be afterwards justified, repeated and enlarged upon before the presiding Judge), and that no person, not even a party to the suit, has a right to initiate proceedings for a contempt (except as aforesaid) which the Court at the time, to use the language of his judgment, "did not think worthy of notice." "*Worthy of notice*"—in these three words lies the whole difficulty. If the slanders on Mr. Justice Wilson, sitting as one of the Judges of the Court of Queen's Bench, by the most powerful and most widely-circulated journal in Canada, the slander having been written and justified by one of the most prominent and influential public men in the Dominion are "not worthy of notice"—it will not be worth noticing *any* libel by *any* person on *any* Judge in Canada, from this time forth forever ; and it was not worth noticing the contempt for which Mr. Houston a few days before, in the same suit, apologised, and for which he was severely reprimanded by the Court and ordered to pay costs. If this be so, the offence of contempt of Court is abolished, and the dignity of the Courts, and therein incidentally the due administration of justice, must forever depend solely and without other aid upon the good sense and good feeling of the people. If this is to be the law, let it be so enacted, but at present it is not the law, and we doubt the wisdom of the Courts being deprived of a power which, in this country at least, has been sparingly invoked and discreetly exercised.

The profession will deplore that Mr. Justice Morrison did not take the high ground assumed, and rightly so, by the Chief Justice. He may possibly have felt straitened by what are, we believe, generally thought to have been two great mistakes : firstly, the omission by the Court itself, or the Attorney-General on its behalf, to take notice of the insult offered to the Court in the person of Mr. Justice Wilson ; secondly, granting the rule nisi *at all*, if Mr. Justice Morrison's opinion be correct that the application was made too late. And here we may refer to what we respectfully submit was another mistake, though we fully appreciate the motives which therein actuated the learned Judges—allowing the delinquent to repeat and add to these insults in the face of the Court itself.

The Court was somewhat in a false position, and Mr. Justice Morrison was led away, we venture to think, by side issues from the great principle involved. He may have been perfectly right in saying that the person aggrieved had, under the circumstances, no *locus standi* before the Court, but it is impossible to forget the forcible words of Mr. Christopher Robinson, of counsel for the applicant, in an argument said to have been one of the most perfect ever heard in Osgoode Hall : "The contempt is there and the Court is there ; it is for the Court to deal with it, and it is for the Court to do what they may consider right and becoming in the discharge of their high office"—The Court and the contempt still confront each other. He also said, "Is the law to prevail or is Mr. Brown to be above the law?"—let each reader answer this question for himself. There is an unhappy feeling abroad that in some way or another, or for some reason or another, and whether justly or unjustly, and whosesoever the fault may be, the dignity of our Courts has suffered, and the majesty of the law has been

shaken; and there is a danger that the due administration of public justice may, in a greater or less degree, have been impaired in consequence. But whether this be so or not, of one thing there is no doubt,—if this case be reported, as we suppose it will, it will be the only one to be found in the books where a contempt of Court so gross, and language so insulting and so shamelessly justified has gone unpunished.

PRACTICE OF CONVEYANCERS.

Questions of real property law, many in number, and great in importance, have been settled by conveyancers, whose course of practice in the investigation of titles has been recognized and usually adopted by the Courts, when the like points arose for decision. It has been remarked that as a conveyancer never advocates an opinion which he does not entertain, his duties have a good deal of the judicial character about them. The practice of conveyancers, to be found embodied in such works as those of Coventry, Lee, Preston and Hubback has been settled by a manner of procedure peculiar to English conveyancers. Thus when one conveyancer considers a title objectionable on any point, another is usually applied to by the opposite party to answer or confirm the objection. If the two differ, the difficulty is solved by being referred to some eminent member of the profession, with the understanding that both sides are to abide by his decision. The opinion of this referee becomes, when pronounced, a part of the practice of conveyancers, and it may almost be said, of the law of the land.

It is not uninteresting to contrast the contemptuous style in which the early conveyancers were alluded to by some of the judges, with the respect and deference ultimately accorded to the learned men and their successors, such as Mr. Shadwell (father of the Vice-Chancellor), Mr. Bell and Mr. Sanders, whose opinions were usually confirmed by the courts, and whose valuable conclusions systematized and consolidated the practice of conveyancers. Lord Keeper Henley refers to the duties of conveyancers in *Pelham* v. *Gregory*; 1 Ed. 522, and says, "great Pyrrhonists they are." Afterwards, the same judge, when Lord Northington, adverts to "the want of of curiosity and oscitancy of conveyancers, which, he says, is "natural enough, their time being more dedicated to perusal than thought:" *Drury* v. *Drury*; 2 Ed. 58. As against this compare the encomium of Lord Hardwicke, in the same case in appeal: "The opinions of conveyancers at all times, and their constant course is of great weight. They are to advise, and if their opinion is not to prevail, must every case come to law? No: the received opinion ought to govern. The ablest men in the profession have been conveyancers. Sir Orlando Bridgman (a book of whose precedents has been published); Webb, a great practiser in the King's Bench, was an able conveyancer, and the present Mr. Filmer," 2 Ed. 64. In later times, Lord Eldon, in the great case of *Smith* v. *Doe* v. *Jersey*, 2 Bro. & Bing. 599, thus expressed himself: "My Lords, we hear of the practice of conveyancers, and that amounts to a very considerable authority; and I am justified in that assertion by the opinions of the greatest men who have sat in Westminster Hall, who, I am persuaded in many instances, if matters had been *res integræ* would have pronounced decisions very different from those which they thought proper to adopt, if they had not taken notice of the practice of conveyancers as authority." And in this opinion he is followed by Lord Redesdale in the same case at p. 611. See also *Candler* v. *Candler*, Jac. 232, where Lord Eldon summarises the matter by observing that a long course of practice sanctioned by professional men is often the best expositor of the law. Again, in *Howard* v. *Ducane*, 1 T. & R. 86, we find the same

judge recurring to the same subject. "I think that the practice of conveyancers has settled a great deal of law. I put this case on the practice of conveyancers, and I am not sorry to have this opportunity of stating my opinion that great weight should be given to that practice."

Upon questions of title this practice has received very clear and express judicial and legislative sanction in the Province of Ontario. The Quieting Titles Act permits the court to receive and act upon any evidence which the practice of English conveyancers authorizes to be received on an investigation of title out of court (sec. 9). By the general orders in Chancery, the vendor is to afford the purchaser all the means of verifying the abstract in his power, in the manner and according to practice usual with conveyancers (G. O. 394).

One of the characteristic points of distinction between conveyancers, evidence and that ordinarily adduced in courts of justice is adverted to by Strong, V.C. in *Re Higgins*, 19 Gr. 310. "In weighing the sufficiency of evidence, the practice of conveyancers is more strict,—in determining the admissibility—more lax, than that of courts of justice." Another exception was commented on by Mowat V.C. in *Brady* v. *Walls*, 17 Gr. 700, as to the admissibility of affidavits in establishing questions of fact arising between vendor and purchaser. The Vice-Chancellor there adopts the language of Lee on Abstracts, where it is said that a purchaser may be often compelled to complete a contract upon evidence which would not enable him to recover the estate in an adverse suit against a hostile party in possession.

The Legislature of Ontario has sought to remove this anomaly to some extent by declaring that many pieces of evidence heretofore well recognized as satisfactory in the practice of the profession, as between vendor and purchaser, shall likewise be evidence in the litigated proceedings at law against hostile parties in possession: 39 Vict. cap. 29, secs. 1, 7. The important question, as to the principle upon which the court will deal with evidence on summary applications, under this act to obtain the opinion of the court in respect to requisitions or objections (s. 3) recently arose before Vice-Chancellor Blake. He laid it down that the evidence sanctioned by conveyancers' practice, was sufficient, and that answers given upon matters of fact by means of statutory declarations, were in effect, evidence upon which the court would act in compelling the completion of a purchase. These declarations have now lost their voluntary character, and have now acquired the force of affidavits by virtue of the Dominion Statute, 37 Vict. c. 37. This was one of the objections commonly urged against the admissibility of these declarations as evidence: the other was that of their unsatisfactory character, because made to serve a purpose and *exparte*. This is however a question of degree, and if the statements are by well-known persons, who are disinterested, and who have from their age and circumstances special means of knowing the facts, and if their statements are not only uncontradicted, but corroborated by other statements it was laid down that according to the fractions of conveyancers, the answers so made to the objections and requisitions were sufficient.

LAW SOCIETY OF ONTARIO.

Michaelmas Term, 1876.

The following is the *resumé* of the proceedings of the Benchers during this term, published by authority:

Monday, 20th November, 1876.

Hon. Stephen Richards, Q.C., was elected Chairman to preside in convocation, the death of the Hon. John Hillyard Cameron, Q.C., having caused a

vacancy in the office of Treasurer of the Society.

Mr. D. B. Read, Q.C., having reported the death of the late Treasurer, the Hon. John Hillyard Cameron, it was moved by Mr. James Maclennan, seconded by Hon. James Patton, and

Resolved, That Hon. Stephen Richards be Treasurer of the Society until the next statutory election.

Moved by Mr. Maclennan, seconded by Hon. M. C. Cameron, and

Resolved, That the Benchers of the Law Society in Convocation assembled, have learned with feelings of the profoundest sorrow and regret of the death, on the fourteenth instant, of their late Treasurer, who held the office continuously for the long period of seventeen years. That Convocation also record in its minutes its sense of the great loss sustained by the Benchers and the profession generally, as well as by the community at large, by the death of Mr. Cameron, who as well by his amiable personal qualities as by his professional eminence and ability had gained universal esteem and admiration throughout the Province.

That a copy of this resolution be communicated by the Secretary to the widow and family of the deceased.

The gentlemen whose names appear in the usual lists were called to the Bar and received certificates of fitness.

The petition of Charles W. Mortimer was presented and ordered to stand over.

Tuesday, 21st November, 1876.

The report of the examining committee on the examination of students for admission was adopted.

The balance sheet for the third quarter of 1876 was laid on the table.

Ordered, That all accounts up to the first Saturday of this term be audited by the Auditors.

Mr. Henderson, Q.C., gives notice of motion to amend rule No. 11 of the Law Society, respecting the day for the election of a Treasurer, and that notice of such election be given to the Benchers.

Mr. McKelcan moved, seconded by Dr. Henderson,—

That the resolution passed in Convocation on the fifteenth day of February, 1876, "that the fees thereafter to be paid "in Michaelmas Term yearly for certifi- "cates for Attorneys and Solicitors, and "including term fees should be thirty "dollars per annum," be and the same is hereby rescinded, and that the sum of twenty dollars be the fee payable by each Attorney or Solicitor for his annual certificates in Michaelmas Term of each year under rule 143 of this Society, such sum of twenty dollars not to include the fee of two dollars per annum, payable by each Barrister under rule 81 of this Society.

Moved by Mr. Read, seconded by Mr. Patton

That the motion of Mr. McKelcan relative to the resolution of convocation of the eighteenth of February, 1876, in regard to the fees for annual certificates, and the motion of Mr. Armour in regard to the Law School be adjourned for consideration to Saturday next, and that a call of the Bench be made for that day.

Moved by Mr. Armour, seconded by Mr. Benson,—

That the expenses of the funeral obsequies of the Hon. J. H. Cameron, late, and for seventeen years Treasurer of the Law Society, be paid by the Law Society. Carried.

Ordered, That all notices of motion given for to-day do stand for the next meeting of convocation.

Saturday, 25th November 1876.

The resolution of Mr. McKelcan, relation to the annual certificate fees adjourn-

ed from the 21st instant, was read a first and second time.

Ordered, That the examiner be paid the usual fee of fifty dollars.

Mr. Maclennan presented the report of the Committee on Reporting. Consideration of it ordered to stand until Monday, 27th inst.

Ordered, That Mr. Grant's letter, relation to his position as reporter of the Court of Chancery, dated 23rd November, 1876, be referred to the Committee on Reporting for their consideration and report.

Mr. Crickmore's resolution relating to the Law School, and the subject of the Law School generally was referred to a special committee composed of Messrs. McCarthy, Crickmore, Bethune, H. Cameron, Patton, E. Martin, McKelcan, and Maclennan, to report to convocation next term.

A letter from Mr. Armour dated 22nd instant, tendering his resignation as a Bencher was read.

Ordered, That the Secretary be instructed to reply to Mr. Armour's letter, expressing the regret of the Benchers that he should have tendered his resignation, and their hope that he will reconsider the same.

Ordered, That Mr. McCarthy's notice of last term for the reconsideration of the rules for the call of Barristers, and the admission of Attorneys in special cases, do stand over to the last Friday of this present term for consideration.

Ordered, That Mr. Irving be added to the Library committee.

Ordered, That Messrs. Crickmore, Patten and Osler be the Benchers to superintend the scholarship examination under section 6 of rule 145.

Ordered, That Convocation adjourn until Monday next, 27th November, at 10:30 o'clock A.M.

Monday, 27th November, 1876.

Ordered, That the Clerk of the Crown and Pleas furnish the Law Society forthwith with a certified copy of the Attorneys roll of the Court of Queen's Bench, and that the Law Society pay the expense thereof.

Ordered, That the County Court Judges have the privilege of using the Benchers rooms while at Osgoode Hall.

Mr. McKelcan's resolution relating to the annual fees was read a third time and carried.

Friday, 8th December, 1876.

In the absence of the Treasurer, Mr. Read occupied the chair.

The petitions of Messrs. Duggan and Colquhoun were read and disposed of.

Mr. George Tifany's application to be allowed to matriculate without examination, on certificate of having matriculated in the London University, was refused.

The Reporting Committee to whom Mr. Grant's letter, relative to his position as reporter of the Court of Chancery was referred, brought in their special report which was adopted.

The general report of the Committee on Reporting was adopted.

The petition of Mr. Cooper was read, and a small increase on his salary granted.

A letter from the Deputy Minister of Education, accompanying General Eaton's report on the Public Libraries of the United States, was read and referred to the Library Committee to acknowledge.

Mr. Charles E. Miller's petition, praying that he be called to the Bar in Ontario under 39 Vict. chap. 31, was refused.

Mr. Evans was appointed Examiner for next term.

The proceedings of the London Bar on the subject of the decease of the late Treasurer, were laid on the table, and the Secretary directed to acknowledge the same.

Mr. Hodgins was added to the com-

mittee on the Law School appointed this term.

Mr. Pollard's letter as to the alleged unprofessional conduct of an attorney was read.

The plans of increased accommodation in the library, were laid on the table and referred to the Finance and Library Committees.

Ordered, That the subject of law stamps, and of all contracts between the Government and the Law Society be referred to a committee composed of the following Benchers, namely: Messrs. Hodgins, Maclennan, Bethune, M. C. Cameron, and Meredith, to report to convocation on the last Tuesday of the year.

Tuesday, 26th December, 1876.

Mr. Crickmore in the chair.

The report of the Examiners on the Scholarship Examinations was received, read and adopted, the scholars being:

4th year, Mr. Fullerton.

3rd year, Mr. T. Ridout.

2nd year, Mr. Sheppard.

1st year, Mr. Hodgins.

The Special Committee on Stamps and Contracts between the Government and the Law Society, was re-appointed.

A letter from Mr. Armour, refusing to reconsider his resignation, was read.

Ordered, That Mr. Armour's resignation be accepted, and that a call of the Bench be made for the first Tuesday of next term to elect a Bencher in his place.

Mr. Osler gave notice that he would move on the first Tuesday of next term for the appointment of a Committee on Discipline, under the Act of last session.

Mr. Casey's petition to have his intermediate examination was granted.

MECHANICS' LIEN LEGISLATION.

The manifest injustice to which our present mode of tinkering statutes sometimes leads is well illustrated by the case of *Walker* v. *Walton*. In that case the plaintiff acquired a lien under the Mechanics' Lien Act of 1873, and duly registered his lien as required by that Act; the plaintiff, however, had given the defendant credit which did not expire until after the passing of the Mechanics' Lien Act of 1874, he consequently had not commenced a suit before that Act came into operation.

Under the Act of 1873, section 4, it would have been sufficient to keep the plaintiff's claim alive if he had commenced his suit and registered a *lis pendens* within 90 days after the period of credit expired. The 14th section of the Act of 1874, however, provides "that every lien shall absolutely cease to exist after the expiration of thirty days *after the work shall have been completed* * * * unless in the meantime proceedings shall have been instituted to realize the claim *under the provisions of this Act*, and a certificate thereof is duly registered, &c." And the 20th section comes in with the usual, although unnecessary declaration "that all Acts inconsistent with the provisions of this Act are hereby repealed."

Under this legislation, the Court of Chancery has been driven to hold that although the plaintiff up to the time of the passing of the Act of 1874, had a perfectly good lien equivalent in point of fact to a mortgage on the property for the amount of his debt, yet the moment that Act came into operation, that lien was blotted out, because he did not fulfil the condition which the legislature had imposed by the Act of 1874, of taking proceedings under a statute, which, at the time fixed for taking the proceedings had not even been passed!

We commend this instance of *ex post facto* legislation, and the taking away of vested rights by Act of Parliament, to the attention of the House at its present session.

So much for this kind of legislation. But as to the subject matter involved, probably the best thing to do would be to repeal the Mechanics' Lien Act *in toto*. The enactment is in itself unnecessary and illogical, the wording is obscure, and its provisions unintelligible and contradictory. The Act has resulted in more harm than good to the honest and prudent mechanic. The legislation on this subject, though following in a measure a somewhat similar law in some of the United States took its origin here, and probably there also, in an improper bid on the part of politicians for the votes of what is called the "working class." It is scarcely to be wondered at, under these circumstances, that a provision conceived in such a spirit, and so carelessly carried out should lead occasionally to results as unjust as they are absurd.

DOMINION BAR SOCIETY.

The following is a report taken from the *Halifax Citizen* of a meeting of the Nova Scotia Bar Society, specially called to consider the report of the committee appointed to promote the formation of a Dominion Bar Society. Their Honors, Judges Wilkins and Smith courteously adjourned the civil and criminal courts to permit a full attendance of Barristers.

The following report of the committee was read by the Secretary:

"Nova Scotia Barristor's Society.

Halifax, Oct. 20th, 1876.

"Report of the Committee to whom was referred the formation of a Dominion Barrister's Society.

"Your Committee report that as soon as practicable after their appointment they prepared a circular on the subject of the proposed Society which they sent to the office-bearers of sister societies, and also to leading members of the Bar in the Provinces of Ontario, Quebec, New Brunswick and P. E. Island, there being no society yet organized in P. E. Island. The circular is printed in the *Law Journal* for October.

"That on the first of September one of the committee, Mr. James, having occasion to visit the Upper Provinces, took the opportunity, with the assent of the committee and of the council of this Society, to spend some time in visiting the parties to whom the circulars had been sent and other prominent members of the Bar, and advocating personally the expediency of forming the contemplated Association. That he was received as the delegate of this Society with marked kindness and distinction, and the object of his mission, after undergoing the most thorough discussion in all its aspects, was in every instance approved, and the greatest encouragement expressed in favor of the project—not only by the Bar, but many members of the Bench of the Upper Provinces. Official answers have not yet been received from the Law Societies of the Provinces of Quebec and New Brunswick, but the approbation of the scheme so uniformly expressed is sufficient to induce your committee to recommend that measures be continued to procure the formation and organization of the Society without delay.

"That it was the intention of your Committee to recommend the Society to invite the delegates from the Law Socities and other Barristers to assemble in Halifax next vacation to organ e the Society, but the officers and leading members of the Societies in Ontario and Quebec, while they would gladly accept our invitations, urged strong reasons in favor of organizing the Society at Ottawa during the ensuing session of the Legislature. The reasons urged appear to your Committee sufficiently cogent to indu them to recommend that course; and if our Society shall consent, the Committee suggest that a general meeting of the new Society be held in Halifax, next July or August. That the meeting be made as numerous a meeting as possible of the Bar of the Dominion, and that provision be made for the reading of a series of able papers on legal subjects by leading member of the Bench and Bar of the Dominion. You Committee believe that such a meeting woul be attended with invaluable results to the Bar, and the public of the Province and the Dominion.

"The Committee recommend that the meeting at Ottawa be called on the invitation of the Bar at Ottawa, the Law Society of Ontario, or the Law Society of the district of Montreal, to be followed by our invitation to be given at Ottawa for the meeting here in next vacation.

"The Law Society of Ontario has given the project the unanimous and hearty approval of their Benchers in Convocation, and favorable

answers are daily expected from the other societies.

"In conclusion the Committee recommend that the thanks of the Council be extended to the office-bearers of the Law Societies of Ontario, Montreal and Quebec, and to the members of the Judiciary and Bar of the Upper Provinces for the distinction and kindness with which they received the delegate of this Society on his late visit, and the warm interest manifested by them in the undertaking; and also that a special meeting of the Society be held to consider the subject.

"All of which is respectfully reported.

"The following resolutions were then, after an animated discussion on each in turn, passed unanimously, with the exception of a very mild dissent from one of the meeting to the third resolution:

"Moved by Shannon, Q.C., seconded by Mr. Eaton:—

"*Resolved*, That the report be received and adopted, and that the committee be requested to continue their efforts to promote the formation of the Society.

"Moved by James, Q. C., seconded by McCoy, Q. C:—

"*Resolved*, That the thanks of this Society be given to the Honorable J. H. Cameron, Q.C., Treasurer, and the other officers of the Law Society of Ontario; William H. Kerr, Esq., Q.C., Battonnier, and the other officers of the Law Society of Montreal; J. Dunbar Esq., Q.C., Batonnier, and the other officers of the Law Society of Quebec, for the distinction and kindness with which they received the delegate of this Society on his late visit, and for the interest manifested by them in the proposed undertaking.

"Moved by J. S. D. Thompson, seconded by Mr. Coombes:—

"*Resolved*, That this meeting authorise the Committee, if they consider it advisable, to call a meeting in Halifax, in July or August next, for the purpose of organizing the proposed Society, or for the purpose of holding the first general meeting in case it shall have been previously organized at Ottawa.

"Moved by Johnston, Q.C., seconded by Mr. Haliburton:—

"*Resolved*, That the members of the Society look forward with much interest to the formation of a Dominion Law Society, believing that it will tend to elevate the tone and status, as well as to strengthen the hands of the profession throughout the D minion, while it will promote fraternal intercourse with our Brethren in the other Provinces.

"Moved by Mr. Motton, seconded by Mr. Power.

"*Resolved*, That the thanks of the Bar Society be tendered to the Committee for their efforts in promoting the formation of the proposed Society, and especially to Alexander James, Q.C., Esq., for the able, efficient and satisfactory manner in which he discharged his duty on the recent delegation to the Upper Provinces.

"The meeting was also addressed by the President, McDonald, Q.C., and the Vice-President, Ritchie, Q.C., and by Messrs, J. G. Foster, L. G. Power and other gentlemen.

"The project was discussed in its various bearings and the spirit of the meeting was cordially in its favor."

The Bar of Nova Scotia have taken this matter up with energy and deserve great credit for the proper spirit which they have evinced in setting forward the movement.

SELECTIONS.

CHIEF JUSTICE WHITESIDE.

With profound sorrow we have to record the death of the Right Hon. James Whiteside, Lord Chief Justice of Ireland, which melancholy event took place on last Saturday afternoon at Brighton, where, under medical advice, that eminent judge and distinguished Irishman had been sojourning for some time past. Mr. Whiteside was born on the 4th of August, 1804, at Delgany (Co. Wicklow), of which parish his father, the Rev. Wm. Whiteside, was the rector. In 1825 he entered Trinity College, Dublin, where his career was respectable rather than brilliant. He twice unsuccessfully competed for a scholarship; but he won some classical honours, and distinguished himself as a member of the Historical Debating Society. In 1828, before graduating, he had entered as a law-student in London, where he studied, first in the chambers of Mr. Chitty, the eminent pleader, and afterwards in those of Mr. Swanston, a chancery practitioner in high repute and the annotator of Lord Eldon's decisions. He won several prizes in the University of London while attending the lectures of Professor Amos; and in the Debating Society attached to that institution made a considerable figure—so much

so that an American writer, who there met young Whiteside, describes his eloquence as "the glory and the admiration of the University," and dilates on the "intense enthusiasm, earnestness, and vehemence" of his style, and the "appropriateness and expression of his action." A few months after joining the Society, Whiteside was elected its president, and delivered the inaugural address. And within the walls of that Society it was that he became intimate with Joseph Napier, afterwards his brother-in-law, and Lord Chancellor of Ireland, and with W. E Foster, biographer of Goldsmith, for whose "Vicar of Wakefield" Mr. Whiteside ever cherished a peculiar predilection. At this time, also, the young student wrote and published some vivid descriptions of the legal celebrities who came under his observation while attending the courts.

In 1830 Mr. Whiteside was called to the Irish Bar, and shortly afterwards joined the North-East Circuit. In 1832 he took his degrees of B.A. and M.A. in the University of Dublin, and in the year following married Miss Napier, the Right Hon. Sir Joseph Napier's sister, by whom he has left no issue. He soon acquired a considerable practice, and became famous especially for his defence of prisoners. He took silk in 1842. In the year 1843 O'Connell and his associates were summoned to the Bar of the Court of Queen's Bench to answer a charge of sedition. The great State Trials followed. The eyes of Europe were turned on those for ever famous proceedings; their story was translated into every civilised tongue, and discussed in every land in Christendom. The mighty Tribune defended itself. The other traversers were represented by the greatest lawyers and advocates of the day; Henn, Fitzgibbon, Shiel, O'Hagan, Pigot, Perrin, Hatchell, Monahan, Moore, were there arrayed, and there, too—of counsel for Mr. (now Sir Charles) Gavan Duffy, the proprietor of *The Nation* newspaper—stood forth James Whiteside. And equal indeed to that great occasion did our Whiteside prove himself, and when at the close of his speech, says a writer in *The Dublin University Magazine*, after "a magnificent burst of impassioned eloquence, he sank completely exhausted into the arms of one of his fellows, the triumph of the man was complete, the feelings of those present, wound up to the highest pitch of tension, found vent in a burst of enthusiastic applause which the court, apparently under the influence of strong emotion itself, found it difficult for many moments to subdue." By this noble effort of forensic oratory Mr. Whiteside was at at once raised to the front rank of his profession; he became not only famous at the Bar, but an idol of the people; and O'Connell himself paid him the marked tribute of entrusting to him the motion for a new trial, upon which the judgment of the House of Lords, setting aside the verdict, was ultimately given. In the midst of triumph he was struck down. Unequal to the strain imposed upon him by the flood of business that poured in, his health gave way, and he was obliged, in the very zenith of his fame, to quit the sphere of his professional labour, and travel in Italy for two years. His active mind, however, still required, like Byron's, "something craggy to break itself on," and while seeking repose and health under Italian skies, he employed his literay talents in the production of a work entitled "Italy in the 19th century." Returning to Ireland restored to health, Mr. Whiteside almost immediately resumed his position as a leader of his profession; and soon after another great opportunity occured which riveted his reputation. In 1848 another State trial took place—that of Smith O'Brien and his associates—and to Whiteside was entrusted the defence of Mr. O'Brien. His skill and eloquence on this occasion added to his laurels and to his popularity, and thenceforth no cause of any importance was tried in which he did not take a leading part; we might mention *Butler* v. *Mountgarrett*, *Colclough* v. *Colclough*, *Att-G.* v. *Wilson*, the *Fitzgerald* will case, and many others. In 1851 Mr. Whiteside was returned to Parliament for Enniskillen. In 1852 he was appointed Solicitor-General for Ireland, under the ministry of the late Lord Derby, and continued to hold office during its brief tenure of power. On Lord Derby's return to office, in 1858, Mr. Whiteside was appointed Attorney-General, was sworn in a member of the Privy Council, and elected a Bencher of the King's Inn. In 1859 he took his degree of L.L.D., and was returned to Parliament for the Dublin University. In the year 1862 a case was tried in Dublin, which, in its romantic and extraor-

dinary character, exceeded any of the *causes celebres* of the Victorian age. As the chivalrous advocate of Theresa Longworth in the Yelverton case, Mr. Whiteside delivered one of the most splendid addresses ever spoken; and it has been related that when, overwhelmed with the plaudits of his countrymen, he hurried over to Parliament, the great advocate was the object in the British House of Commons of an ovation unique in its annals, being received as he entered the chamber with general and enthusiastic applause, amidst which a grave member for the city of London, carried away by the spirit of the hour, exclaimed, in a tone audible throughout the entire House, "England is proud of her Irish orator." In 1865, under Lord Derby's third administration, Mr. Whiteside was re-appointed Attorney-General, and, after holding that office for a few weeks, was, in 1866, elevated to the dignity of Lord Chief Justice of Ireland, on the retirement of Chief Justice Lefroy, on whose behalf he had, previously, so generously and ably spoken in the House of Commons; and that position he continued to hold until, at the age of 72 years, the great old man passed away in the full vigour of his intellectual powers, and mourned by his countrymen of every class and opinion—rich and poor, learned and simple alike.

The late Lord Chief Justice can hardly be said to have been a great judge or a profound lawyer, but he was an eminently constitutional magistrate, and

> "To him the humblest right that cheers the hut,
> Outweighed all treasures of the golden East."

His veneration for Coke and the ancient masters of our jurisprudence was intense, and so intimately had he imbued his mind with the spirit of their teaching that often when his exposition of the letter of the law failed in perfectness he yet, as it were instinctively, reached a sound conclusion. But, his judgments on the whole are not such as to command a lofty legal estimate. That which will, perhaps, be found to display his powers at their best, however open to controversy may be the decision at which he arrived, appears to us to be his judgment in *O'Keefe* v. *Cardinal Cullen* (7 Ir. L. T. R. 100), which has been exclusively recorded *in extenso* in what he himself but lately called "that valuable publication, the *Irish Law Times*" (*Willes* v. *L. & N. W. Ry.*, Ir. R. 10 C. L. 103). Neither can we claim for him a position of a superior order in literature; but, the work which was the fruit of his sojourn in Italy won a success in its day, and exhibited some ability; while the magazine sketches written in his early manhood, and recently re-published, evince much acuteness of perception and pungency of humour However, though he had always a cultivated taste for literature—a taste which was curiously displayed during the State trials of 1843, when he insisted on the reading of the exquisite little lyric, "My beautiful, my own"—yet, his labours as a *littérateur* were merely recreations, and serve but to show the catholicity of his highly-cultured intellect. That he could wield his pen at times, even to the last, with rare incisiveness and nerve is shown by his recent correspondence with the Treasury, in reference to Mr. Blackham's appointment (printed *in extenso*, *ante*, p. 485). Several lectures, delivered at public institutions, also remain, and further evince the versatility of his genius. His career and characteristics as a politician it comes not properly within our province to discuss, but it is allowed on all hands that he was ever true to his convictions, and that he was a consistent and honourable political opponent. He was a ready, fearless, and effective debater, but, as a parliamentary orator failed on the whole to equal his reputation as a forensic advocate. Beyond measure his greatest legislatitive achievement was the introduction of the Irish Common Law Procedure Act, 1853; nor should it be forgotten that the Act of 1856, moreover, was to a great extent an embodiment of his suggestions. That in itself constitutes no inconsiderable claim to national remembrance, and it shows that, however hostile might be the fine old chief to the pretentious schemes of modern law-reform, his predelection for the ancient ways prevented him not from joining in the march of real improvement. But it is as an orator, above all, that Whiteside will be remembered in after years. Matchless his rhetoric, brilliant his dialectic power, impressive and impassioned his language; every variety of forensic eloquence was at his command—humour, pathos, passion, stern sarcasm, scathing invective, wit in its raciest vein,

fancy in its most graceful sallies; and his too, in an incomparable degree, was that supreme excellence in an orator, the δεινοτης of the Greek rhetoricians, that passionate eviction and all-persuasive *vehemence* of contention—

> "Spurr'd at heart with fiercest energy
> To embattail, and to wall about his cause
> With iron-worded proofs."

In him the Forum has lost a great advocate, the Bench an upright conscientious magistrate, Ireland an illustrious and patriotic son. He had won the admiration of his profession, the esteem of his judicial brethren the applause of his country; and who but mourns with us to-day that, by the relentless hand of death.

> "The work is done,
> That neither fire, nor age, nor melting envy,
> Shall ever conquer."

—*Irish Law Times.*

PRIVILEGE OF COUNSEL.

The recent case of *Lewis* v. *Higgins*, which came before the Lord Chief Baron and a special jury on Monday, 4th Dec., seems to have thrown our daily contemporary the *Echo* into a state of some excitement and indignation. The action was brought by Mr. George Lewis, the well known solicitor, against Mr. Napier Higgins, Q.C., for a slander uttered by him whilst addressing the court on a motion in his capacity of counsel. As soon as it appeared that the language complained of was pertinent to the matter then before the court, and that it was spoken by Mr. Higgins as counsel in the case, the Lord Chief Baron ruled that the action was not maintainable, and a non-suit was accordingly entered.

The *Echo*, in commenting upon the case, after intimating that "a barrister with a wig on is a chartered libertine," and that "a law court, which should be the home and safeguard of justice, is the only charmed spot in England where gross injustice, as far as defamation of character is concerned, may be perpetrated," concludes its remarks thus: "Since the people have obtained more power we have seen a few law reforms accomplished, and possibly we shall some day see one carried in reference to the privilege of barristers. Lord Chief Justice Erle said many years ago that he hoped he should live to see the day when counsel would be held responsible for their words. Had we been present, we should have said 'Amen.'"

It is difficult to imagine how a writer, professing to write in the public interest, could deal with the question in this spirit. He must clearly be ignorant of the grounds on which this privilege rests, and seems altogether to have lost sight of the true interests of the public, whose cause he professes to advocate. The fact is that the privilege of counsel is the privilege of the public; and it is for the public convenience and in the public interest alone that that privilege is accorded.

This was pointed out as long ago as the year 1818, by Lord Ellenborough, in the case of *Hodgson* v. *Scarlett*, when he said: "So a counsel entrusted with the interests of others, and speaking from their information, *for the sake of public convenience*, is privileged in commenting fairly and *bonâ fide* on the circumstances of the case, and in making observations on the parties concerned, and their instruments or agents in bringing the cause into court." "In truth," they said "the freedom of speech at the Bar is the privilege of the clients, and not of the counsel." And this was pointed out still more clearly by the Lord Chief Baron when he said: "I think it essential that you (the jury) and the public should clearly understand that the privilege claimed by the defendant, Mr. Higgins, as applicable to this case, is not that of counsel, but the privilege of the people of England as represented by counsel. It is essential to the well-being of the whole community that a counsel, when once engaged, should discharge his duty fearlessly, without the shadow or shade of apprehension as to the consequences."

There can be no doubt that this is the true ground of the privilege, which also arises from the reason of the thing itself. This is pointed out so clearly in the argument of the counsel in the case of *Hodgson* v. *Scarlett* that we reproduce their remarks here: "If the counsel are not protected by law, it will be a very great misfortune to the clients of persons placed in similar situations. Every man's efforts will be shackled unless he is to be allowed to make such observations as, in the

fair and honest discharge of his duty, he may think necessary for his clients. In truth the freedom of speech at the Bar is the privilege of the clients, and not of the counsel. It would be impossible for matters properly to be discussed at Nisi Prius, unless considerable latitude were allowed, and if any evil follows from this, it must be endured for the sake of the greater good which attends it."

The first case in which this question of privilege arose in a court of law was the case of *Brook* v. *Sir Henry Montague* (Cro. Jac. 90), decided in the reign of King James the First, where it was held that "a counsellor in law retained hath a privilege to enforce anything which is informed him by his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false." And so in *Wood* v. *Gunton* (Styles, 462), decided in 1655, "If a counsel speaks scandalous words against one, in defending his client's cause, an action lies not against him for so doing, for it is his duty to speak for his client, and it shall be intended to be spoken according to his client's instructions." In *Hodgson* v. *Scarlett* (1 B. & Ald. 240) decided in 1818, the question was fully considered, and the same doctrine was laid down. Lord Ellenborough, as before pointed out, putting it on the ground of public convenience. Justice Holroyd, put it on a similar ground, viz., that the privilege of counsel was the same as the privilege afforded to the party in the judicial proceeding. "It would seem," he said, "that such an action cannot be supported for words false and malicious spoken by a party conducting his own case before a court of competent jurisdiction; and if a counsel be in the same situation as the party, then such an action cannot be supported against counsel. If they be fair comments upon the evidence, and be relevant to the matter in issue, then, unless express malice be shown, the occasion justifies them. If, however, it be proved that they were not spoken *bonâ fide* or express malice be shown, that they may be actionable; at least our judgment in the present case does not decide that they will not be so." It will be seen that Mr. Justice Holroyd seemed to be inclined to qualify this privilege, and to hold that it was by no means absolute; but we apprehend that in the present state of the law that qualification does not exist, and that the privilege is absolute when the comment is revelant to the matter in issue. When, in the case of *Lewis* v. *Higgins*, Mr. Serjt. Parry proposed to put his client, Mr. Lewis, into the box, the Lord Chief Baron intimated in the most decided manner that he should allow no questions to be put to Mr. Lewis except such as went to show that the words were in fact spoken. Addressing Serjt. Parry he observed, "If you think fit to put Mr. Lewis in the box, I cannot prevent your doing so, but I must tell the jury that assuming it is proved that the words were spoken by the defendant, yet if they were spoken by him in his character of counsel in a suit, the action cannot be maintained. I cannot enter into any other question, nor can I receive any evidence as to what were Mr. Higgins instructions. I can receive evidence only to show first that the words were spoken, and, secondly, the occasion on which they were spoken. I must tell the jury that the law of England forbids me to enter into any other questions in the case, and does not authorize them to enter into and to determine upon the merits of a case affecting the character of a member of the Bar of England, which depends entirely upon what has been stated by him in a cause legitimately before the judge in a court of justice." The privilege accorded to counsel, when properly understood, is a wholesome privilege, and one that is absolutely necessary for the due administration of justice, and to further the true interests of the public. In the words of the Attorney-General, Sir John Holker, "an advocate is worthless if he be not fearless," and we by no means look forward to the day when the tongues of counsel shall be tied, and when advocates shall shrink from doing their duty to their clients for fear of the consequences resulting to themselves. The greatest safeguard against the abuse of this privilege lies in the general good sense and honourable feeling of the Bar, together with the judicious controlling influence of the Bench. Possibly it may occasionally be abused, but we believe that the occasions are very rare indeed; and, at all events if any evil does follow from the exercise of the privilege, which we are far from admitting, "it must be

endured for the sake of the greater good which attends it."—*Law Times.*

THE COSTS OF ATTORNEYS' LETTERS.

During the progress of a trial, not very long since, before the Lord Chief Justice of England, it transpired that the writ had been issued and served without the usual preliminary of an attorney's letter demanding payment. His lordship most properly condemned the attorney's conduct in the matter, observing that "nothing could justify such a course but absolute necessity." In another case, *Rinder* v. *Deacon*, 11 Ir. Jur. N. S. 414, it appeared that the defendant (resident in Ireland) paid the amount of his debt to the plaintiff (resident in England) without informing the plaintiff's attorney, and without paying the costs of the writ which had been issued and served. The attorney, knowing nothing of the payment, marked judgment, and levied an execution. The defendant then moved to set aside the judgment, but it was held that the motion should be refused with costs, but that the judgment should be reduced by the amount paid. There Pigot, C. B., said:—"I hesitate about giving costs in favour of plaintiff's attorney, for I think this motion indicates that it is the practice, prevailing too much at present, that an attorney, instructed to collect the debts of an English client, makes the summons and plaint the medium of his demand. The attorney's duty to the community at large and to his client was, *not* to make the summons and plaint the first means of collecting his client's debts, but to apply by letter, in the first instance, to defendant." It is hardly to be expected, however, that attorneys should conduct their business on principles of pure benevolence, and if the duty is imposed on them of writing to their opponents, in the first instance, one would suppose that the suitor who, by neglecting or refusing to pay the demand in question, caused the litigation, should pay the costs of at least one preliminary letter, incident to the recovery of the demand. So, in Bewley on Taxation of Costs, p. 124, it is said:—"As between party and party, the costs of no letter will be allowed except *one* letter of application prior to the issuing of the writ (*Capel* v. *Staines*, 5 Dowl. 770), and such duplicates as the number of defendants may require." To the same effect, see Gray on Costs, 497. The case above referred to, which thus decides, was determined in 1837; and the same proposition was laid down seven years previous in *Morrison* v. *Summers*, 1 B. & Ad. 559. In those cases, however, the previous decision of *Kirton* v. *Braithwaite*, 1 M. & W. 310, was not cited, in which Parke, B., intimated a contrary opinion. In 1859 the question again arose in *Holmar* v. *Stevens*, 6 Jur. N. S. 124, more fully reported 33 L. T. R. 148, where *Kirton* v. *Braithwaite* and *Capel* v. *Staines* were cited and underwent much discussion. There the attorney had written to the defendant demanding payment of two bills of exchange, together with 13s. 4d. costs of application. The amount of the debt was tendered at first without any costs of the letter, but afterwards with 5s. for the letter. The plaintiff's attorneys considered that they were entitled to 13s. 4d. on the ground that, although only one letter was written, the two bills were in the hands of different holders, so that there were two clients and two applications; but they said that they would have been satisfied to accept the 5s. only that then the form for the writ was made out, and the clerk was just then going to issue it. The writ was issued accordingly, and the defendant moved to set it aside. Willes, J., after referring to those facts, said:—"It appears, then, that this writ was issued, not for the purpose of enforcing payment of the client's claim, but for the purpose of exacting payment of what the attorneys had no legal right to. The writ is the commencement of the action, and an attorney has no claim for any letter until a writ is issued. At the time of the Common Law Commission, it was proposed that a simple letter claiming payment should be the commencement of the action; but it was thought that the commencement of an action should be a more solemn proceeding, and the writ was continued. The attorneys having no legal right to charge for the letter, the issuing of the writ for the purpose of exacting payment for it is merely an abuse of legal process." And

Byles, J., added that "the attorney's letter does not prevent the tender of the principal without any costs." The writ was set aside accordingly. That case, therefore, is an authority against the right of an attorney to recover the costs of a preliminary letter before writ issued. That case was cited, but distinguished by Palles, C. B., in *Allen* v. *O'Callaghan*, appearing in our present issue (10 Ir. L. T. R. 135); but the interlocutory *dicta* of the Court, exclusively recorded in our Report, will be found to support at least a *semble*, that an attorney of a creditor, retained to demand a debt, has no right to insist on payment of any costs of his letter demanding the debt, previously to issuing a writ of summons and plaint.

It will thus be seen that the authorities on this question are rather conflicting; but it must be allowed that it would be a hard thing if a creditor who was kept out of his money should be obliged to pay his attorney for trying to get it, without redress against the debtor, who, by tendering the debt in such case, adopts the attorney's letter, by reason of which alone he obtains authority to tender at all to the attorney.—*Irish Law Times.*

CANADA REPORTS.

DOMINION.

IN THE EXCHEQUER COURT OF CANADA.

IN CHAMBERS.

(Reported for the *Law Journal*, by Robert Cassels, Jr., Barrister-at-law).

Wood v. The Queen.

Petitions of right—Application for security for costs. When to be made.

Held, 1. Where by a letter addressed to the suppliant the Secretary of the Public Works department stated that he was desired by the Minister of Public Works to offer the sum of $3,950 in full settlement of the suppliant's claim against the department, an application on behalf of the Crown for security for costs was refused on the ground that the Crown could suffer no inconvenience from not getting security, as well as on the ground of delay in making the application.

2. Application for security for costs in this Court must be made within the time allowed for filing statement in defence, except under special circumstances.

[Ottawa, Nov. 28, 1876].

The petition of right in this cause was filed on the 1st September, 1876, by the suppliant who described himself therein as "of the city of London and county of Middlesex, in that part of Great Britain and Ireland called England," claiming a sum of $50,000 for alleged services in connection with the Parliament Square in the city of Ottawa.

On the 27th September, the day before the statement in defence was due, the counsel for the Crown asked the solicitors for the suppliant for further time to answer, and obtained one week. The statement in defence was not filed at the expiration of the week, but on the 27th October the solicitors for the Crown wrote to the solicitors for the suppliant stating that the statement in defence was in the hands of the printer, and, for the first time, asking security for costs. Some correspondence ensued, but security was refused. On the 13th November, the agents of the solicitors for the Crown took out a summons calling upon the suppliant to show cause why security for costs should not be given, and and for a stay of proceedings. This summons was enlarged until the 27th November, when

Cockburn, Q.C., shewed cause. There is some obscurity about the practice to be followed in this Court on such an application—whether that of the Court of Chancery or that of the Common Law Courts. In Chancery the application must be made before time for answering expires or is extended, when the residence of the plaintiff appears on the face of the bill. This application is too late, further time to answer having been given; see *Smith* v. *Day*, 2 Chy. Ch. 456. *Arthur* v. *Brown*, 3 Chy. Ch. 396. But the government have security in their own hands. By a letter from the Secretary of the Public Works department the suppliant is offered the sum of $3,950 in full settlement of his claim against the department. A copy of this letter with an affidavit verifying it, was read, and see *Re Carroll*, 2 Chy. Ch. 305, and *Lenomand* v. *Prince of Capua* there cited and Ch. Arch. 12th ed. 1418.

McIntyre for Attorney-General. There is no rule of the Exchequer Court applicable to security for costs. But rule 258 provides that "in proceedings to which the provisions of rule 1 shall not apply, and which are not otherwise provided for by these rules, the practice in use

in H. M. High Court of Justice in England shall be had recourse to, and followed as nearly as may be." The English rules made under the Judicature Act, 1875, do not make any special provision as to security for costs, but sec. 21 of the Supreme Court of Judicature Act of 1875 provides that the methods of procedure, which at the commencement of the Act, were in force in any of the Courts whose jurisdiction is transferred to the High Court may be continued to be used and practised in the High Court of Justice, where no other provision is made. The Petition of Right Act, 1876, sec. 15, also introduces the English practice where no other provision is made. Now by English Petition of Right Act, (23 & 24 Vict., cap. 34, sec. 1), a party may intitule his petition in any one of the Supreme Courts of Common Law or Equity, at Westminister, in which the subject matter of such petition or any material part thereof would have been cognizable if the same had been a matter in dispute between subject and subject, and sec. 7 makes the practice and procedure of the Courts of Law and Equity, respectively applicable to Petitions of Right. This petition is framed after the Common Law form, and would have been tried in a Common Law Court, and therefore the Common Law rules as to security for costs should be followed, which is that security can be applied for at any time before issue joined. As to the 2nd objection—the funds referred to are not such as would satisfy a demand for security for costs: *Kilkenny Railway Co.* v. *Fielding*, 6 Exch.; *Higgins* v. *Manning*, 6 Prac. R. 147. The letter of the Secretary of the Public Works department offers a sum as a settlement, but not on account, and this being refused, the crown stands on its strict rights.

Fournier, J. The application for security for costs in this case ought to have been made within the time allowed for filing the statement in defence. The Crown has asked for and obtained an extension of time to file a statement in defence, and has thereby waived its right to demand security for costs. Application for security for costs in this Court must be made within the time allowed for filing statement in defence, except under special circumstances. The power of ordering a party to give security for costs being a matter of discretion, and not one of absolute right, and it appearing that the government offered by letter from the Secretary of the Public Works department the sum of $3,950 to the suppliant in settlement of his claim—in the exercise of my discretion, I, on this ground also, refuse the application, as, in my opinion, the doing so cannot subject the Crown to any inconvenience, whilst its allowance might cause great hardship to the suppliant.

The summons is therefore discharged. Costs to be costs in the cause to the suppliant.

Summons discharged.

CHANCERY.

Re Shipman—Wallace v. Shipman.

Deficiency of personal estate—Personal representatives—Administration of Justice Act.

Since the Administration of Justice Acts an executor or administrator is not entitled to come to this Court for the purpose of administering the estate of the deceased, even when the personal assets are insufficient for the satisfaction of the debts.

Hearing on further directions.—This was a proceeding for the administration of the estate of a testator, in which the proceedings were taken upon the application of the executors who had proved the will. The grounds upon which they sought to have the estate administered were that the debts shewn to be due by the testator exceeded the amount of his personal estate, and that it would be necessary to resort to his real estate in order to satisfy them. The Master's report shewed that the debts exceeded the amount of the personal estate which had come to the hands of the executors, to a small extent.

Moss for the executors claimed that they were justified in taking the course they had done, as it appeared that the debts were in excess of the personalty: *Re Ette*, Prac. R. 159, and *Doner* v. *Ross*, 19 Grant 229. It further appeared that the defendant who was the residuary legatee and devisee had consented in Chambers to the granting of the Administration Order.

W. Cassels for defendant urged that since the Administration of Justice Acts, the reason for granting such an order had ceased. That executors or administrators no longer require the protection of the Court of Chancery, even when there appears to be a deficiency, for now upon being sued at law they can plead the deficiency and obtain an administration from the Court of Law. He referred to *Parsons* v. *Goading*, 33 U.C. Q.B. 499.

Blake, V. C.—Inasmuch as under the Administration of Justice Acts the executors can upon being sued at law by any creditor sufficiently protect themselves by a plea shewing the deficiency and claiming administration, there is no longer any necessity for them to come to Chancery for protection. There is no allega-

tion here that the executors were threatened with suit; nor is there anything to show that the executors could not have divided rateably the assets, in their hands, to the satisfaction of the creditors. Acting on this principle I have on two occasions recently declined to grant orders for the administration of estates at the instance of the personal representatives. As, however, it appears that the defendant, who, as residuary legatee, is entitled to the balance of the estate, consented to the order for administration, and had obtained the benefit of the proceedings, the executors, under these exceptional circumstances, are allowed their costs.

ASSESSMENT CASES.

In the matter of the Appeal of James Hamilton from the decision of the Court of Revision of the Township of Biddulph.

(Reported for the *Law Journal*).

Assessment—Road Company—Highway—Exemption—32 Vict., cap. 36, sec. 9, ss. 6.

The Proof Line Gravel Road company was incorporated under the Joint Stock Company's Act, (C. S. U. C. cap. 49) and constructed their road on a public highway or road allowance in the Township of Biddulph. The Township assessor assessed the property in the road against James Hamilton as Secretary of the Company.

Held, 1. That the assessment was illegal, because although the road was vested in the company by sec. 60 of the Joint Stock Companys Act, it was, nevertheless, a public highway, and therefore exempt from taxation by 32 Vict., cap. 36, sec. 9, subsec. 6.

2. That in any event the assessment should have been in the name of the company, and not in that of one of its officers.

The assessor for the Township of Biddulph assessed the property in the Proof Line Gravel Road company as real estate, in the name of James Hamilton as Secretary of the Company, so describing him. From this assessment Mr. Hamilton appealed to the Court of Revision, on the grounds (1) that property in a Road company is not assessable as real estate against the company, but (2) even if so the name of the company and not that of an officer of the company should appear on the roll. The Court of Revision confirmed the assessment, whereupon Mr. Hamilton appealed to the County Judge of Middlesex, but as he was absent the case was heard before His Honour Judge Hughes of St. Thomas.

H. Becher for the appellant.

Meredith, Q.C. for the respondent.

Hughes, Co. J.—I think there can be no question that the individual name of the appellant must be altogether erased from the assessment roll. It is conceded by the respondent's counsel that his name should not have been at all inserted therein, that the Court of Revision should have ordered his name to have been erased and the corporate name of the persons intended to be assessed inserted, that is if the property intended to have been assessed is assessable, as he contends it is.

The question then arises—is the property of that corporation of whom the appellant is secretary, and in whose name it was inserted in the roll, assessable under the Ontario statute, 32 Vict. (1868-9) cap. 36? By the 5th sec. the term "property" includes both real and personal property. The terms "personal property" and "personal estate" includes shares in incorporated companies and all other property, except land and real estate, which includes all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty and also excepting property in the act expressly exempted (see the first five sections of the Assessment Act). By sub-section 6 of section 9, "Every public road and way" * * is expressly exempted from taxation. By section 22, "Land is to be assessed in the municipality in which the same lies, and includes the land of incorporated companies as well as property, and personal property is to be assessed in the municipality in which the personal property is situated." By section 36, "The property of an incorporated company is not to be assessed against the corporation, but each shareholder is to be assessed for the value of the shares or stock held by him as part of his personal property; but in companies (such as the Proof Line Road company) who invest the whole of their means or the principal part of their stock in real estate already assessed for the purpose of carrying on such business, the shareholders are to be only assessed on the income derived from such investment."

The property which is the subject of this assessment is that part of "the Proof Line Gravel Road which passes through the Township of Biddulph" which was constructed on the public highway or road allowance formerly existing in that Township. It is contended on the one hand that it is real estate assessable as such; it is contended on the other, that it is a public road or highway and not assessable as real estate in that Township—but only as personal property—not against the corporation but

against each shareholder under the 36th section at their respective places of business or of residence.

The question arises at once what is it that the company owns which is assessable? On the principle laid down in the 9th section that all land and personal property in the Province shall be liable to taxation—it can never be contended that it is liable both as real estate and personal property, for that would be inconsistent with the intention of the 8th section which requires that taxes shall be levied equally upon the whole rateable property of the locality according to its assessed value, and not upon any one or more kinds of property in particular or in different proportions—in other words I do not apprehend it was the intention to have the interest of shareholders in a Road company in the same property taxed in one county as real estate and in another county as personal estate, which would be the case were the decision of the Court of Revision in this case upheld.

The Road company was incorporated under the Joint Stock Company's Act—Con. Stat. U. C., cap. 49—and under the decision of the Court of Queen's Bench in *Regina* v. *Davis*, 35 U. C. Q. B. 110, it is a public highway within the meaning of the Municipal Act as being a road laid out by virtue of a statute, and as said by Morrison, J. in that case, "we see nothing in any of the statutes to deprive the highway of its public character, or abridge or interfere with the rights of the public to the use and enjoyment of these highways."

It was contended here that because the 60th section of the Joint Stock Road Companies Act, vests the road and property of the company in the corporation, that therefore it is private property and assessable as land the same as any other property, but under the decision I have named, it is still a public highway in the same way as roads declared to be vested in Municipal corporations under the Municipal Act are declared to be so, and because it is a public highway it is within the exemption of the 6th subsection of the 9th section of the Assessment Act.

The authorities quoted in the judgment in the case of the *Toronto Street Railway Co.* v. *Fleming*, 35 U. C. Q. B. 264, go strongly to illustrate another principle upon which this property would not be assessable as real estate; (supposing there were no such exemption in existence as that provided by the 6th sub-section of section 9 of the Assessment Act), that is, that the company are not either occupants or owners of the property in the sense that they have the right (although owners of the road by statute) to occupy any part of it to the exclusion of others of Her Majesty's subjects, and exclusive occupation has been held to be the foundation of rateability. The decision of the Court of Revision, should therefore, I think be reversed.

COUNTY COURT OF THE COUNTY OF ONTARIO.

(Reported for the *Law Journal*).

Jones v. Holden.

Justice of the Peace acting malafide and beyond jurisdiction—Quashing conviction bad on its face.

Trespass against a Justice of the Peace. The magistrate in a case brought before him by a complainant who alleged that the plaintiff had taken a sheep of his off the road and sheared it, and kept the wool, made an order which was subsequently embodied in a document purporting to be a conviction, which stated that the plaintiff "unlawfully took a certain ewe from R. W.'s flock on the 4th June last, at Pickering, and having heard the matter of the said complaint, I do adjudge that the said ewe and fleece is the property of the said W. and I order and adjudge the said Jones be discharged therefrom upon giving up the said ewe and fleece to the said W. and paying the costs of this suit." The costs were fixed at $20, and the paper contained the usual distress clause, but the warrant to commit in case of default was struck out.

Held, on motion for non-suit, that, although the pretended conviction was clearly unsustainable, it should nevertheless have been quashed before action brought.

[Whitby, Dec. 12th, 1876—Dartnell, J. J.]

The declaration contained a count in trespass and one in trover, the chattel in question being a sheep and its fleece. No special damage was alleged. Plea, not guilty by statute (C. S. C. cap. 126). It was stated by counsel that the real defences were that the defendant, in doing what he did, acted *bonâ fide* as a magistrate, and that the action could not be maintained until the conviction was quashed. It was admitted that the defendant was a Justice of the Peace for the county of Ontario.

The facts were as follows: one Ward having lost a sheep laid an information before the defendant. The defendant thereupon issued a search warrant setting forth "that on the 4th June, 1876, Ward had a ewe stolen off the highway near his place of residence, and that he had traced her to the residence of the present plaintiff and found said ewe with the wool then shorn." The information, as sworn to by Ward, was substantially to the same effect. The pres-

ent plaintiff appeared before the defendant when evidence was offered before the latter and two other magistrates, who also attending the hearing. The defendant was told by his brother magistrates, as well as by the counsel who appeared for the accused, that the charge was one of larceny, and that the magistrate must either dismiss the case, or commit the prisoner. The defendant's reply was that he knew the law (not stating that he differed from this view). His brother magistrates came to the conclusion that the matter was one of disputed ownership, in which a magistrate could have no jurisdiction, and expressed an opinion, and desired to record the same, that the complaint should be dismissed; but the defendant refused to recognize their authority to act, and made an order in the following words: "I find that the sheep and fleece in question belongs to R. Ward, and I authorize him to take the same, and I adjudge the said Jones to pay the costs *in the suit.*"

Thereupon Jones, in order to obtain his discharge, permitted the constable to take away the ewe; the defendant himself having already taken charge of the fleece.

Subsequently the defendant drew up and filed with the Clerk of the Peace a document purporting to be a conviction, the crime set out being that he Jones "unlawfully took a certain ewe from R. W.'s flock on the 4th June last, at Pickering, and having heard the matter of the said complaint, I do adjudge that the said ewe and fleece is the property of the said W. and I order and adjudge the said Jones be discharged therefrom upon giving up the said ewe and fleece to the said W. and paying the costs of this suit." The costs were fixed at $20, and the paper contained the usual distress clause, but the warrant to commit in case of default was struck out.

This alleged conviction had not been quashed. Evidence was adduced to shew that the defendant refused to take down material evidence, when requested to do so by the counsel for the accused and by his brother magistrates.

At the trial before Dartnell, J. J.

G. Y. Smith for the defendant moved for a non-suit.

Farewell contra.

Dartnell, J. J. (after taking time to consider).

On considering the evidence, I must and do find that the defendant did not act *bonâ fide* in this matter. The presumption in law is that a magistrate acts in good faith, but I think the arbitrary and high handed proceedings of this defendant, in spite of direct advice and warning as to his duty, justify me in finding as I do that he acted *malâ fide*. I am strengthened in this by the circumstance that he himself is silent and not offered as a witness to rebut the very strong case made by the plaintiff. Having found that the defendant acted *malâ fide*, I think under the authority of *Cummins* v. *Moore*, 37 U.C. Q.B. 130, that a notice of action is not necessary, though a sufficient notice, I have already held, has been proved. But in any case I do not think the paper filed with the Clerk of the Peace can, in any sense, be called a "conviction," although it purports to be one. Suppose the crime had been one of rape, and the magistrate had awarded that the accused should marry the complainant. Would this be a conviction? I think not, and this document is almost as absurd. It is, in effect, on the face of it a decree or adjudication in a civil matter, and the magistrate has usurped the functions of a civil court. It was alleged that the defendant thought he had jurisdiction under sections 117, 118 and 119 of the Larceny Act. But this view, as well as that of his *bonâ fides*, he has not ventured to substantiate under oath. I cannot believe that any man of ordinary sense could have honestly believed this. Notwithstanding my opinion that the defendant has totally exceeded his jurisdiction and not acted in good faith, I think I must hold under the authority of *Graham* v. *McArthur*, 25 U. C. Q. B., 478, that the conviction existed *de facto*, however unsustainable, and that it is necessary that such *quasi* conviction should be quashed before this action be brought.

Though I hold the strong opinion that I do as to the high handed, and I may say, outrageous conduct of this defendant, nevertheless I feel I am compelled under the authority of the above case, which was not cited at the trial, to enter a non-suit.

As the plaintiff has the right to move in term for an entry of a verdict in his favor, should I be wrong in the above judgment, I think I should now fix the damages in case such entry should be made. There is no special damage laid in the declaration. It is probable plaintiff might have been entitled thereto if claimed (See *Brewer* v. *Dew*, 11 M. & W. 625). As it is I find the value of the ewe to be $9 and of the fleece $1. So that the damages will be assessed at $10.

The *Law Times* objects to a solicitor advertising his removal from one office to another; and sneeringly remarks that such intimations are commonly found in American newspapers. Not only common, but so far as we can see, quite unobjectionable. There is such a thing as being too particular.

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

CHANCERY.

Skinner v. Ainsworth.

Dower—Specific Performance—Wife refusing to join in conveyance.

Where in a suit for specific performance the wife of the vendor refuses to join in the conveyance for the purpose of barring her dower, the proper mode of protecting the purchaser is to set aside a sufficient portion of the purchase money to indemnify him against the claim for dower in the event of the wife subsequently becoming entitled thereto by surviving her husband; the interest during the joint lives of the vendor and his wife to be paid to him, and also the principal also so set aside on her decease.

Ewart for the plaintiff.

Hector Cameron, Q.C., contra.

Wells v. Hews.

Interpleader suit by Assignee in insolvency—Costs—Insolvent Act of 1875, section 125.

A writ of attachment issued, under which the assignee in insolvency seized goods which were claimed by a person to whom it was alleged the debtor had transferred them. The assignee thereupon filed a bill of interpleader against the claimant and the creditors who had sued out the writ. *Held*, that the assignee was not compelled to apply to the Judge in insolvency under section 125 of the Act of 1875, and relief was afforded to the assignee: and the claimant failing to appear was ordered to be debarred of all interest in the goods in question, and to pay the costs of suit; and the assignee was given a lien on the goods in his hands for his costs.

Bethune, Q.C., for plaintiff.

Beaty, Q.C., and *J. C. Hamilton*, contra.

Barton v. Merritt.

Conveyance to wife of purchaser.

The plaintiff and M. became sureties for W., who absconded, and the sureties satisfied the claim by giving their note for $215, upon which judgment was subsequently recovered against them; whereupon M. absconded from the province. A year previously a conveyance of land had been made to the wife of M. which the plaintiff alleged was so conveyed to her as the appointee of her husband and for the fraudulent purpose of defeating the plaintiff in recovering contribution. The evidence adduced satisfied the Court that more than a year before the parties had entered into such suretyship the contract for purchase had been made in the wife's name, who paid the down instalment; and that the subsequent earnings of the sons and moneys belonging to the wife had been expended in erecting a house upon the premises and paying the balance of purchase money thereof. A bill seeking to charge the land as the property of the husband was, under such circumstances, dismissed with costs.

Duncombe for the plaintiff.

Robb contra.

McLean v. Burton.

Mortgagor and mortgagee—Timber cut on mortgaged premises—Reducing value on premises—Damages for cutting timber.

Semble, that standing timber is within the provisions of the registry laws, and that the purchaser of a right to cut the same is affected with notice of a conveyance from the original owner and a mortgage back from his vendee.

Unless a mortgagor prove demonstrably, so as to leave no room for doubt, that the mortgage premises remain ample security for the mortgage debt, the Court will restrain him from cutting over the whole land.

The jurisdiction as to restraining the cutting and removal of timber is not preventive only; the Court will in a proper case interpose where the timber could be followed. The Administra- of Justice Act (1873, sec. 32) it would appear, however, has removed any technical difficulty o this sort.

Where timber is cut without any intentional wrong, and in the absence of *malafides*, the injury actually sustained by such cutting is the measure of damage to the owner or mortgagee of the land.

Boyd, Q.C., and *Douglas* for the plaintiff.

Moss contra.

Preston v. Lyons.

Reputation of marriage—Revocation of will—Evidence of marriage.

The presumption which arises of a marriage having taken place between the parties by reason

of a man and woman having for many years cohabited and lived together as husband and wife may be rebutted; and after the death of the man the evidence of the woman alone, on which the Court placed full reliance, was received for that purpose, although she was then interested in negativing the fact of marriage, because if married at the time alleged, the will, under which she claimed all the property of the deceased, would under the Act have been revoked.

Bayly for plaintiff.

Moss for defendant.

QUEBEC REPORTS.

SUPERIOR COURT.

McKay v. The Mayor et al. of Montreal.

Militia called out—Payment to—31 Vict. cap. 40, sec. 27—Emergency.

Held, That under the Statute (Canada) 31 Vict. cap. 40, sec. 27, which enacts that the Active Militia shall be liable to be called out to aid the civil powers in riots "or other emergency," and authorizes two Justices of the Peace to call them out, payment for the services of the Militia cannot be resisted by the municipality on the ground that there was no emergency which justified the Justices of Peace in calling them out.

[Montreal, May 1, 1876—20 L. C. Jurist, 221.]

Mackay, J.— In June, 1871, an election was held in the Central Division of Montreal, when Mr. Holton was one candidate and Mr. Carter another.

The 22nd and 23rd were fixed to be the polling days. On the 21st two Justices of the Peace wrote to Col. Osborne Smith, requesting him to be prepared, as there was likely to be a disturbance.

Their letter read thus:

"From reliable information we have good reason for anticipating that the public peace will be disturbed and violence used by a large body of organized men, engaged to take possession of the polls on the 22nd and 23rd instant, in the Centre Division of Montreal. We have therefore to request that you will have sufficient Militia Force in attendance during those days to preserve the public peace, and to suppress any riots that may take place. Our information is that this organized body consists of not less than three hundred men."

Col. Smith on issues 21st his orders to plaintiff. On the 22nd and 23rd plaintiff and officers and 100 men mustered and served as required.

A bill was made up by plaintiff under our Act of Parliament, but defendants refused to pay.

The defendants pleaded that the two Justices issued their order without sufficient cause or reason; that the civil power did not require the aid of any Militia force; that in the absence of riot the Justices had no authority to call out the Militia or to make the city liable to pay them.

The action is based upon the 27th sec. of cap. 40 of 31 Vict., A.D. 1868, which enacts that the Active Militia shall be liable to be called out to aid the civil power in riots "or other emergency," and authorizes two Justices of the Peace to call them out.

The 82nd section of the same Act enacts: "Any officer, non-commissioned officer, or private, of the Militia who, when his corps is lawfully called upon to act in aid of the civil power, refuses or neglects to go out or to obey any lawful order of his superior officer, shall incur a penalty, if an officer, not exceeding forty dollars, if a private, not exceeding twenty dollars, for each offence."

"Where riot was merely anticipated or expected, until the law of 1873, 36 Vict., there was not the power in any two Justices to call out the Militia." (Say defendants.) No such thing; even before 31 Vict. cap. 40 there *was* the power, but who might have had charge to pay men called out might have been a question before the 31 Vict. cap. 40. I have no doubt the Justices here might call out the Queen's subjects in case of riot "or other emergency," and I think that they having required the aid of the military, the latter were warranted in going out, and that the city has to pay them.

Justices of the Peace are required to keep the peace, and to see it kept, to restrain rioters, and to prevent riots. If they fail in duty in these respects they may be indicted for neglect of duty.

Lord Mansfield in *Kennett's case*, A.D. 1781, who was Lord Mayor of London, said that by the common law, as well as by several statutes, Justices of the Peace are invested with great powers to quell riots, and as they may assemble all the King's subjects they may call in even the soldiers; but this should be done with great caution. Kennett was found guilty of neglect of duty.

In *Pinney's case*, A.D. 1832, who was Mayor of Bristol, Ch. J. Tindal with reference to the English Act 1 and 2 Wm. 4, c. 41, talks of it as having been passed just in order to prevent any doubt, *if doubt could exist* (he says) as to the power of Justices of the Peace to command the

assistance of all the King's subjects *by way of precaution*.

That Act 1, 2 Wm. 4, expressly authorizes the Justices to call out the King's subjects when tumult or riot is only likely to take place, or is reasonably apprehended. It was hardly called for, according to the Judges on Pinney's trial.

Surely Justices of the Peace having the duty of suppressing riots are not to be refused the right and power to prevent them.

Before any riot, Pinney, Mayor of Bristol, had called upon the people to aid him towards preventing any. Two days before the riot he swore in hundreds of special constables. Littledale, J., who charged the Petit Jury at the trial, said that this was what the defendant was bound to do. Defendant was acquitted, partly from having taken such precautions.

I have satisfaction at pronouncing this judgment; though having myself to bear part of the burden of the condemnation.

The militia military going out ought to be encouraged.

The 31 Vict. cap. 40, I think ought to be interpreted liberally. I think it may be read as follows:

"The corps composing the Active Militia shall be liable to be called out in aid of the civil power in case of riot or other emergency requiring such services, whether such riot or emergency occurs within or without the Municipality in which such corps is raised or organized;" * * * * * "and the officers and men when so called out shall, without any further or other appointment and without taking any oath of office, be special constables;" * * * * * "and they shall, when so employed, receive from the Municipality in which their services are required the following rates of pay, that is to say;" * * * * * "and the said sums, and the value of such lodging if not furnished by the Municipality may be recovered from it by the officer commanding the corps in his own name," &c.

The twelve lines defining the duty of the Deputy Adjutant General of the District appearing in the body of the sec. 27, may be read (I think) as if they had been, always, at the end of that section.

The Militia ought to be encouraged to go out readily, when called upon to aid the civil power. Else order in society will disappear, and rowdyism be encouraged to go rampant, more rampant than at present. In the absence of a regular military force in the country we are constantly in danger. People do not reflect enough upon this. The power of the Executive to enforce the law is poor enough, except theoretically, of which we in Montreal have recently had examples.

If it be that the Justices of the Peace in the case before us issued their requisition for Militia without sufficient cause, let the defendants go against them.

I hold that as between plaintiff and the defendants, this question is of lesser importance; the plaintiff was called out, and it was not for him to catechise the Justices; as well might each of his hundred men have claimed the right to do so.

Judgment for plaintiff, with costs against the defendants.*

* The following cases were cited at the hearing:—*Rex* v. *Pinney*, 3 B. & Ad. 946; 5 C. & P. 264. *Rex* v. *Kennett*, 5 C. & P. 282. *Rex* v. *Neale*, 9 C. & P. 431.

UNITED STATES REPORTS.

SUPREME COURT OF ILLINOIS.

Pittsburg, Fort Wayne & Chicago Railway Co., Cleveland, Col., Cin. & Indianapolis R. R. Co., Atlantic & Great Western R'y Co., and Erie Railway Co., *Appellants* v. Chester Hazen, *Appellee*.

Appeal from Superior Court of Cook Co.—Liability of Railroad for delay in transporting—Acts of employees—Acts of violence.

1. Responsibility for Delay.—For the delay resulting from the refusal of the employees of the company to do duty, the company is responsible; for the delay resulting solely from the lawless violence of men not in the employment of the company, the company is not responsible, even though the men whose violence caused delay, had but a short time before been employed by the company.

Dickey, J.—On the 10th of December, 1870, Hazen shipped by the freight line of the railway company, a quantity of cheese from Chicago to New York. The cheese was delivered to the consignees at New York, on the 28th of December, eighteen days after the shipment. The proofs tended to show that the usual period of such transit, at that time, did not exceed twelve days; that the weather from the 10th to the 23d was not severely cold, but that severe cold occurred between the 23d and 28th, and that the cheese when delivered in New York was frozen, and thereby damaged to the amount

of $1,100.55, and for this amount was the verdict and judgment in favor of Hazen, from which the railway company appeal.

As an excuse for this delay beyond the usual period of such transit, the defendant at the trial below sought to prove that the sole cause of the delay was the obstruction of the passage of trains in the neighborhood of Lauitsburg, resulting from the irresistible violence of a large number of lawless men, acting in combination with brakemen, who up to that time had been employed by the railway company. That the brakemen refused to work, and were discharged, and other brakemen promptly employed; but the moving of trains was prevented by the threats and violence of a mob. This evidence was objected to by the plaintiff, and excluded by the court. This, we think, was error. It is doubtless the law that railway companies cannot claim immunity from damages for injuries resulting in such cases, from the misconduct of their employees, whether such misconduct be wilful or merely negligent. If employees of a common carrier suddenly refuse to work, and the carrier fails promptly to supply their places with other employees, and injury results from the delay, the carrier is responsible; such delay results from the fault of the employees. The evidence offered in this case, however, tends to prove that the delay was not the result of a want of suitable employees to conduct the trains, for the places of the "strikers" were (according to the proof offered) promptly supplied by others. The proof offered tends to show that the delay was caused by the lawless and irresistible violence of the discharged brakemen and others acting in combination with them. These men, at the time of the lawlessness, were no longer the employees of the company. The case supposed is not distinguishable, in principle, from the assault of a mob of strangers. All the testimony on this subject should have been submitted to the jury for their determination of the question, whether, under all the circumstances, the period of transit was unnecessarily long.

To the delay resulting from the refusal of the employees of the company to do duty, the company is undoubtedly responsible; for delay resulting solely from the lawless violence of men, not in the employment of the company, the company is not responsible, even though the men whose violence caused the delay had but a short time before been employed by the company.

Where employees suddenly refuse to work and are discharged, and delay results from the failure of the carrier to supply promptly their places, such delay is attributed to the misconduct of the employees in refusing to do their duty, and the misconduct in such case is justly considered the proximate cause of the delay, but when the places of the recusant employees are promptly supplied by others, competent men, and the "strikers" then prevent the new employees from doing duty, by lawless and irresistible violence, the delay resulting solely from this cause is not attributable to the misconduct of employees but arises from the misconduct of persons for whose acts the carrier is in no manner responsible.

The judgment is therefore reversed, and the cause remanded for a new trial.

Walker, Craig, & Scholfield, JJ.

We dissent from the reasoning and conclusion in the foregoing opinion.—*Chicago Legal News.*

REVIEWS.

Land Transfer Made Easy. Practical Suggestions, with Concise Precedents. By E. H. Barlee, Esq., Solicitor of the Supreme Court, England. London: Waterlow and Sons (Limited).

The author has thrown together in this pamphlet several practical suggestions for improving the system relative to the transfer of land. In England the trouble and outlay to which vendors and purchasers are exposed are very great, and the author suggests that, without uprooting the present system in England, there might be an *ad valorem* scale, in some measure assimilating land transfers to those of stocks and shares. He also proposes the establishment of deed registries in England, in the capital towns of the different counties. Reference is made to registries of this kind in other countries, where they undoubtedly work well. The pamphlet is deserving of notice in view of the attention which the more easy transfer of land is attracting in England and her colonies.

CORRESPONDENCE.

Letters before Suit.

To the Editor of the Law Journal.

Sir,—I find at page 322, of the Law Journal for last year, the following:

"The rule that an attorney must first write before proceeding to action, is a harsh one, inasmuch as he can, even in England, collect no fee for such labour," but on referring to "Chitty's Archbold," 12th Ed., page 511, I find as follows: "An attorney is entitled to his costs for writing a letter to the defendant demanding the debt before writ issued." Which of the two statements is correct?

Yours, &c.,

A Subscriber.

[See this matter discussed on page 15. —Eds. L. J.]

Suggested amendments—Realising Mortgage debts on execution

To the Editor of the Law Journal:

Sir,—I refer "Lex" to C. S. U. C. cap. 22, sec. 266. Notwithstanding the provisions of this and the following sections, there are difficulties in the way of realising mortgage debts upon an execution against the mortgagee, and they appear to be two-fold: First, the difficulty of knowing where to place the executions so as effectually to bind the mortgage debt: Second, the difficulty in the way of the sheriff getting hold of the mortgage in order to realise it, under the provisions of the C. L. P. Act.

To meet the first difficulty it might be provided that a *fi. fa.* goods placed in the hands of the sheriff of the county in which the mortgaged lands are situated shall bind the mortgagee's interest without any actual seizure of the mortgage security, but such execution should not prevail against any *bonâ fide* payment made by the mortgagor without actual notice of the execution, otherwise every time a mortgagor made a payment on a mortgage he would have to make a preliminary search in the sheriff's office.

To meet the second difficulty, I would suggest that a summary process might be provided for enabling an execution creditor upon production of a certified copy of the mortgage, or the registered memorial, with the registrar's abstract showing that no assignment had been registered, to obtain a reference to one of the Masters in Chancery, to take all necessary proceedings for redemption or sale, as in a mortgage suit. The provisions of 36 Vict., cap. 8, sec. 36, (O) do not appear ample enough for this purpose.

If the first suggestion should be adopted, it would be necessary to guard against the conflict of right which might otherwise arise between an execution creditor who has seized the mortgage itself in the county of A., and another who has a prior execution in the county of B. where the lands are situate.

G. S. H.

Certificate of Lis pendens at Law.

To the Editor of the Law Journal:

Sir,—Allow me to inform "Lex" that in the case of *Medcalf* v. *Richards*, a certificate of *lis pendens* was granted on the 10th December inst., by Mr. Dalton. The full Court of Chancery, however, on the previous day had determined in *Burns* v. *Griffin* that the inability of the Common Law Courts to issue such certificates was a sufficient ground for a plaintiff coming into Chancery to obtain the fruits of an action at law, notwithstanding the provisions of the Administration of Justice Act, 1873. This decision was mentioned to Mr. Dalton, who granted the certificate *quantum valeat*.

Yours, &c.,

Q.

FLOTSAM AND JETSAM.

A disciple of Coke in Charleston, S. C., when asked by a "brudder" to explain the Latin terms "de facto" and "de jure," replied: "Dey mean dat you must prove *de facts* of de case to de satisfaction of *de jury*."

The Bar and the Moustache.—Although the Paris students may fairly claim to be more free and disorderly than those of London or Berlin, it is quite clear that the Paris Bar is under as strict a discipline as that of any city in the world. An edict has gone forth to the effect that moustaches are at once and irrevocably to disappear from the upper lips of all advocates in the Palais de Justice. Of late years the dread authorities of the Faculté de Droit had connived at the wearing of these unprofessional ornaments, and grave Professors had even carried into the lecture-room the forbidden embellishments. But the Minister of Justice has interfered to correct the scandal, and the learned counsel will no longer be permitted to dispense with their razors. The incident has given occasion not only to a great deal of grumbling on the part of those gentlemen, but to some considerable amount of discussion in the public press as to the history of moustaches. —*Irish Law Times.*

At an examination for admission to the bar of Ohio, the examiner propounded this question: "A great many years ago there lived a gentleman named Lazarus, who died possessed of chattels, real and personal. After this event, please inform us, young man, to whom did they go?" The student replied, "to his administrator and his heirs." "Well, then," continued the examiner, "in four days he came to life again; inform us, sir, whose were they then?" Which interesting inquiry we submit to the lawyers. I am not a lawyer, but I see no difficulty in the inquiry. Lazarus died and was buried. As soon as he died, his property, if he left no will, vested in his legal heirs. The law gives no man the right to die for four days and then come to life again. Legally, Lazarus could't rise. I have no doubt the Supreme Court would decide that the Lazarus who rose was not the Lazarus who died. He was a new Lazarus. The new Lazarus would of course know and feel within himself that he was the old Lazarus, and go around boring his legal friends by talking about his legal wrongs, but every lawyer would leave him as quickly as possible, saying in parting, "It's a hard case, but if your heirs can prove your death, and that they came in legally under the statute, there is no way for to make them disgorge. All you can do is this—you're a young fellow about sixty—hire out as a clerk, try to save something from your salary so as to go into business again, build up a grand estate, and perhaps your heirs will reconize your identity.—*Cleveland Herald.*

Death of Sir John Stuart.—We record with regret the death of Sir John Stuart, which occurred on Sunday last. Sir John had reached the mature age of eighty-three years, and up to the age of seventy-eight years he had discharged the arduous duties of Vice-Chancellor. The learned gentleman was much respected, his private character presenting traits worthy of all admiration. Moreover, his delightful vein of humour, his grand manner, and his extraordinary adhesion to ancient ideas and theories, made him a man of mark, altogether independently of his legal and judicial career.

In political life he was famous for the extremity of his opinions in the direction of absolute and unyielding Toryism, and on the bench he was prone to take liberties even with Acts of Parliament which clashed with his own views of equity. Few judges have been more beloved by the profession, or have attracted a larger circle of friends; but the authority of Sir John Stuart on points of law never stood high, his resolution to do what he considered justice in defiance of precedent and positive law having tempted him into decisions from which his intellect and learning would otherwise have recoiled.

Sir John was the second son of the late Dugald Stuart, of Ballachulish, in the county of Argyll, and was born in the year 1783. He was called to the bar at Lincoln's Inn in November, 1819. In January, 1846, on Mr. Gladstone becoming Colonial Secretary under Sir Robert Peel, Mr. Stuart entered on parliamentary life, being returned to the House of Commons for the constituency of Newark, in the Conservative and Protectionist interests. He sat for Newark till 1852, when he exchanged its representation for that of Bury St. Edmunds. In the October of the same year he was raised to the bench as one of the Vice-Chancellors, when he received the honour of knighthood. He continued to sit as a judge in equity for nearly twenty years, retiring on a well-earned pension in 1871, when he was sworn a member of Her Majesty's Privy Council.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Michaelmas Term, 40th Victoria.

DURING this Term, the following gentlemen were called to the degree of Barrister-at-Law.

H. H. G. Ardagh.
J. S. Fraser.
E. P. Clement.
W. H. Culver.
D. W. Clendenan.
I. W. Liddell.
J. W. Nesbitt.
A. C. Galt.
H. Symons.
A. Ogden.
J. L. Whiteside.
F. W. Casey.
C. L. Ferguson.
F. S. Nugent.
T. E. Lawson.
R. Harcourt.
G. A. Cooke.
J. C. Patterson.
J. C. Judd.

Mr. R. E. Wood who passed his examination last Term, and Messrs Maitland McCarthy, E. W. Scane, James Warren and Francis Tyrrell, who applied under 39 Vict., cap. 31, were also called to the Bar.

The following gentlemen received Certificates of Fitness:

John L. Whiting.
John Crerar.
A. C. Galt.
F. W. Patterson.
W. H. Culver.
E. F. B. Johnston.
C. W. Woodward.
C. L. Ferguson.
J. L. Whiteside.
C. S. Jones.
T. M. Mahon.
T. M. Daly.
F. S. Nugent.
J. Creighton.
H. E. A. Kent.
R. J. Duggan.
J. C. Patterson.

And the following gentlemen were admitted into the Society as Students of the Laws and Articled Clerks:

Graduates.

John B. Rankin, B.A.
William Mundell, B.A.
Richard Willis Jameson, B.A.
John Brown McLaren, B.A.
Alexander Chrysler, B.A.
Henry Edmund Morphy, B.A.
Frederick Covert Moffat, B.A.

Junior Class.

Allan McLean.
James Thompson.
Edward A. Peck.
Harry Fowler Lee.
William Blackader.
William Valleau Maclise
John W. Redick.
Thomas Adam.
Samuel Squire Young.
William Cayley Hamilton.
Alfred Beverley Cox.
John A. Gilbert.
Archibald McKay.
Robert K. Cowan.
Frederick A. Dawson.
William Havelock Garvey.
Daniel Fraser McWatt.
Robert Gilray.
Harry V. Carter.
George S. Lynch Staunton.
John Barry Scholefield.
Frank Marshall McDougall.
George Rivers Sandeson.
Arthur H. McKenzie.
William R. Thompson.
William Proudfoot.
Henry Stephen Blackburn.
Newenham Graydon.
Alexander John Snow.

Articled Clerks.

Charles Howard Widdifield.
Robert Miller.

After Hilary Term, 1877, a change will be made in the Preliminary Examinations.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes, Book 3; Virgil, Æneid, Book 6; Cæsar, Commentaries, Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition

Law Society, Michaelmas Term.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Cæsar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3, Outlines of Modern Geography, History of England (W. Doug. Hamilton's), English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and amending Acts.

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vict. c. 16, Statutes of Canada, 29 Vict. c. 28, Administration of Justice Acts 1873 and 1874.

That the books for the final examination for Students-at-Law shall be as follows:—

1. For Call.—Blackstone, Vol. I., Leake on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1*st year*.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and amending Acts.

2*nd year*.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3*rd year*.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I., and Vol. II., chaps. 10, 11 and 12.

4*th year*.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

Treasurer.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

To the Benchers of the Law Society:

The Committee on Legal Education beg leave to submit the following report:

Your Committee have had under consideration the representations made from time to time to the Benchers, and referred to your Committee, respecting the different courses of study prescribed for Matriculation in the Universities, and for Primary Examination in the Law Society, and now recommend:—

1. That after Hilary Term, 1877, candidates for admission as Students-at-Law, (except Graduates of Universities) be required to pass a satisfactory examination in the following subjects:—

CLASSICS.

Xenophon Anabasis, B. I.; Homer, Iliad, B. I. Cicero, for the Manilian Law; Ovid, Fasti, B. I., vv. 1 300; Virgil, Æneid, B. II., vv. 1-317. Translations from English into Latin. Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of quadratic equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; An examination upon "The Lady of the Lake," with special reference to Cantos v. and vi.

HISTORY AND GEOGRAPHY.

English History, from [illegible]een Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar. Translation of simple sentences into French prose. Corneille, Horace, Acts I. and II.

or GERMAN.

A paper on Grammar. Musæus, Stumme Liebe Schiller, Lied von der Glocke.

2. That after Hilary Term, 1877, candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), be required to pass a satisfactory examination in the following subjects:—

Ovid, Fasti, B. I., vv. 1-300,—or
Virgil, Æneid, B. II, vv. 1-317.
Arithmetic.
Euclid, Bb. I., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

3. That a Student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk, (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

4. That all examinations of Students-at-Law or Articled Clerks be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

THOMAS HODGINS, *Chairman.*

Osgoode Hall, Trinity Term, 1876.

Adopted by the Benchers in Convocation August 29, 1876.

Treasurer.

DIARY FOR FEBRUARY.

1. Thur..Last day for collector to return roll. Attorneys Examinations.
2. Frid..Examination for call to the Bar.
3. Sat....Examination for call with honors.
4. SUN..*Sexagesima.*
5. Mon..Hilary Term begins. Law Society Convocation meets.
6. Tues..Law Society Convocation meets.
10. Sat....Law Society Convocation meets.
11. SUN..*Quinquagesima.*
13. Tues..Last day to move against Municipal election.
15. Thur..Rehearsing term in Chancery. Last day for Assessors to begin to make rolls.
16. Frid..Law Society Convocation meets.
17. Sat....Hilary term ends.
18. SUN..*Quadragesima.*
24. Sat....St. Matthias.
25. SUN..*2nd Sunday in Lent.*
27. Disraeli's Ministry formed, 1868.

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THE

Canada Law Journal.

Toronto, February, 1877.

It will be well to note that *Abell* v. *Church*, 26 C. P. 338, has been reversed by a majority of the Supreme Court at Ottawa (Strong, J., dissenting). This restores the original decision of the Court of Common Pleas.

The firm of solicitors alluded to in our last issue (p. 2) writes us, saying, "We were as much surprised as you could have been, and more disgusted, at seeing that our names had been appended to the advertisement referred to in your January number." We were satisfied that so respectable a firm could not have consented to such an improper use of their names, and have much pleasure in publishing their statement that the circular was issued without their authority, and that they have taken means to repress it.

Judge Willard, of the Supreme Court of South Carolina, is in a fair way to acquire name and fame by the boldness of his judicial deliverances. He seems to go deep into the roots of things, and proposes to revive the primitive conception of law as expounded, for instance, by Sir Henry Maine. This author informs us that when a judgment was pronounced, in the early ages, by a king, the supreme law-giver, it was assumed to be the result of a direct divine inspiration. The Carolina judge in ordering a mandamus to issue against one of the canvassers, made use of the following language in commenting on the power of the court: "It is clothed with majesty. We do not speak the voice of men; we speak in judgment, and judgment is the voice of God." How awkward it would be if this divine occupant of the bench happened to be reversed in appeal!

ALTERATIONS AT OSGOODE HALL.

Some time ago when enquiries were made as to the possibility of Osgoode Hall being provided with some of the necessaries, not to say conveniences, which are to be found in public buildings in these days, we were told to wait until the proposed addition should be built, and that then we should see what we should see. It was thought by some that it would be a simple matter to provide a tap, a pump, or a fountain, where one could get some cold water to drink; others thought it would be an inexpensive luxury to add to the water some soap and towels wherewith to perform the simple operation of washing ones' hands; it occurred to others again, who had not recently come from the free backwoods, that a water-closet would not be amiss. There was, moreover, a serious want of some accommodation in the way of barrister's consultation rooms, where arbitrations of a certain class could occasionally be held, a law reporter's room, a room for short-hand writers, &c. It was also felt to be a want that there was no place where a cup of coffee and a crust of bread could be obtained within the walls of the building by a famished profession. These and many other things were spoken of as being in prospect when the millenial time of the new addition should come. But the additions have been made, and we are amazed and disappointed to find that in no one respect have the above mentioned requirements been supplied. This is bad enough, but there are other matters which we fear will hereafter be sources of discomfort and consequent complaint.

The sum of $25,000 was appropriated by the Province by a vote of the House of Assembly for additional accommodation, mainly for the use of the Court of Appeal, but partly also with reference to the requirements of the Court of Chancery. The appropriation was supplied by the unclaimed balances in the latter Court and accumulated interest. The authorities of the Court of Chancery thought, under the circumstances, that this money should be applied towards providing increased accommodation for that Court and greater security for their records. It was thought proper, however, to use the money for both purposes, and one flat of the new building has been devoted to the use of the Master's Office, giving ample accommodation to the officials of that important department. The sum expended has been about $18,000. The further sum of $4,500 was placed in the estimates for general repairs, and devoted to painting the hall and Courts.

No one passing the front of the hall along Queen street would suppose that such a large sum had been expended, inasmuch as the addition has been placed directly in rear of the centre of the old building This has probably been done with a view to connect the Court room of the highest court in the Province with the hall from which it opens. This was a laudable object in itself, but the effect has been disastrous, in reference to some consequent details. (1) It has destroyed the previous convenient arrangements for the accommodation of the Common Law Judges; (2) The addition is practically inaccessible from the main building; (3) The effect would have been vastly better and the expense but little, if anything, more if the new building had been placed in rear of the Court of Chancery with its face towards College Avenue. This would also have obviated what cannot but be looked upon as the unfortunate results of its present location, hereafter referred to. It was, we believe, the practical suggestion of the present learned Chief Justice of Ontario, whilst a Bencher, to make arrangement with the county to build a

proper Court house in rear of Osgoode Hall; and whether that idea be carried out or not, it is most probable that at some future day it will be necessary to add more buildings, and these being in rear of the eastern wing, and facing the east, as a corresponding block to that suggested on the west, would, with the other parts, make a grand whole, which would be a worthy temple of justice for this Province, and continue to be, as the centre building of Osgoode Hall has been, a credit to the Dominion at large.

The arrangement which has been adopted leads to several serious inconveniences which now seem difficult of adequate remedy. The Judge's library having been turned into a Court room for the Court of Appeal, and the new library being immediately in rear of it, and the office of the clerk of the Court being in rear of that again, it is manifest that the only access to the clerk's office is by passing first through the Court of Appeal and then through the Judge's library. The Judges of the Queen's Bench must perform part of the same journey to arrive at their new library, whilst their brethren of the Pleas must also go through the Court of Appeal, or make use of a glass passage way or gallery, which runs from their room, outside the windows of the Court of Appeal, and which, by the way, there is no provision for heating in winter time.

The new offices for the Master of the Court of Chancery are on the ground floor, and are fine commodious apartments. They are, however, even more hopelessly inaccessible than that of Mr. Grant. It will be possible occasionally, if the door be not locked, to peep into the Judge's library, and if not met by a judicial frown, to steal with noiseless steps across the learned carpet, and so reach the haven of Mr. Grant's room. But the unfortunate Chancery practitioner who has business *hither* (in the office of Records and Writs, or the Registrar's or Referee's office) and *thither* (in the Master's office) must don his snow-shoes, ulster and cap, or erect an umbrella, as the case may be, and take a constitutional round half the square before he can reach Mr. Taylor or Mr. Ross, and so back and forth, much to the good of his health, but sadly to the waste of his time. We must not omit to mention that Mr. Grant can be reached in the same circuitous manner with the aid of a back stairs which connects the two flats. The Practice Court room has been made much larger (which by the way was quite unnecessary), and the windows are at the side only and none facing the benches, and in this respect it is improved. The appartment to be occupied by the Court of Appeal is a fine room in itself, but looks insignificant after seeing the handsome and spacious halls devoted to the Common Law Courts.

The retiring room of the Judges of the Queen's Bench has been divided into two small rooms, one for each Puisne Judge, with a passage way taken off which connects these rooms with the Court of Appeal. The Chief takes the room recently occupied by the Appellate Judges.

Such are the alterations and additions which have been made. We trust that a remedy may still be found for some of the defects and deficiencies, though it is impossible to rectify what we hold to be the radical mistake—placing the new building in its present inconvenient position.

APPEALS UPON EVIDENCE.

Now that there are so many Courts of Appeal, it is of no small consequence to have it clearly ascertained in how far our higher Courts will entertain appeals which depend chiefly, or entirely, on the effect to be given to the testimony which has been adduced in the Court below. The last reported judicial utterance upon this question has been that of Mr. Justice Burton in the important case of *Davidson*

v. *Ross*, 24 Gr., at p. 50. He states the rule thus: "In a case wherein there is a conflict of testimony, where the evidence on each side is evenly balanced, the value of seeing the witnesses and observing their demeanour cannot be over-estimated, and in such a case, when the Judge has come, on the balance of testimony, to a clear and decisive conclusion, it would require, as it has been said, a case of extreme and overwhelming preponderance to induce a Court of Appeal to interfere with the decision of the Judge." We propose to consider how far, in the light of authority, this language correctly represents the practice as followed in appellate tribunals, at the present day, where a Judge has passed upon the evidence in the Court below.

The language of the learned Judge is evidently drawn from the decisions of the Privy Council, and particularly those reported in Admiralty appeals. Reference may be made for confirmation of this, to the case of the *India*, 14 Moo. P.C. 210, and the case of the *Alice*, L.R. 2 P.C. 295, which followed the former case and wherein the exact expressions made use of by Mr. Justice Burton may be found. Very much the same rule was laid down, but not so inflexibly in *Day* v. *Brown*, 18 Gr. 681, in appeals from the Master. Payment was there sworn to by three witnesses, who gave time, place and circumstances, in corroboration of each other. It was sought to reverse the Master's conclusion by circumstances which threw suspicion upon the fact of the alleged payment. The Court held that the circumstances were not of such a nature as to outweigh the direct evidence of payment, but it was also laid down that the conduct and circumstances proved might be such as to overturn the mere oral testimony that such and such a thing had occurred. The exception indicated in *Day* v. *Brown* was acted upon in *Chard* v. *Meyers*, 19 Gr. 358, where Strong, V.C., held that though the direct testimony was conflicting and balanced, yet the circumstances of the case were against the Master's conclusion. The same Judge also held in *Morrison* v. *Robinson*, 19 Gr. 480, that the rule in *Day* v. *Brown* applied only where the evidence being directly contradictory, there were no circumstances pointing to the probability of one statement rather than to that of the others, thus very much limiting the general expressions in the earlier judgment. In *Orr* v. *Orr*, 21 Gr. 451, Blake, V.C., (sitting in the Court of Appeal) expressed his views against extending the rule beyond this: that when it was merely the question of the credibility of one witness as against another, or of several witnesses as against others, there the finding of the Judge of the first instance should be followed.

In a case before the Lord Justices, on an appeal in a case of nuisance from the Master of the Rolls, before whom the witnesses had been cross-examined, Mellish, L.J., observed, "I think great weight must, in cases of this kind, be given to the decision of the Court below; and unless we can see plainly to our minds that there is a wrong inference drawn on a point of fact, we ought not to interfere with the decision:" *Salvin* v. *The North Brancepeth Coal Company*, 22 W.R. 907. In the Court of Appeal, in England, as lately constituted, the Judges had recently to consider the decisions of the Privy Council in an appeal which was also from the Admiralty Division. The judgment of the Court was delivered by Baggallay, J. A., who said that the parties to the cause were entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that the Court could not excuse itself from the task of weighing conflicting evidence, and drawing its own inferences and conclusions, though it should always bear in mind that it has neither heard nor

seen the witnesses, and should make due allowance in this respect. And then the previous rule was modified to this extent: that the Court of Appeal will be disinclined to interfere when the Judge hearing the witnesses has come to his decision upon the credibility of witnesses as evinced by their demeanor, but otherwise in cases where it depends upon the drawing of inferences from the facts in evidence: *The Glannibanta*, L.R. 1 P.D. 283.

The same question again came up in the Court of Appeal in *Bigsby* v. *Dickenson*, 25 W.R. 89 (Nov. 1876), where the Judges affirmed the views expressed in *The Glannibanta*. James, L.J., observed, "of course, if we are to accept, as final, the decisions of the Court of first instance in every case where there is a conflict of evidence, our labours would be very much lightened. But then that would be to do away with the right of appeal in all cases of nuisance, for there never is one brought into Court in which there is not contradictory evidence." And in the same vein Bramwell, J.A., followed thus: "the Legislature has contemplated and made provision for our reversing a judgment of a Vice-Chancellor where the burden of proof has been held by him not to have been sustained by the plaintiff, and where he has had the living witnesses and we have not. If we were to be deterred by such considerations as those which have been presented to us from reversing a decision from which we dissent, it would have been better to say at once that, in such cases, there shall be no appeal."

From a consideration of these cases we conceive, therefore, that Mr. Justice Burton has laid down the rule rather too broadly and emphatically in *Davidson* v. *Ross*. While a Court of Appeal may be unwilling to disturb a judgment which has been arrived at in consequence of the Judge believing one witness rather than another, yet there will be no hesitation in reversing a judgment (1) where the evidence is insufficient; or (2) where, credibility being equal (as is ordinarily the case when the witnesses are not parties) the Judge below has deduced wrong conclusions or drawn wrong inferences from the facts in evidence; or, (3) where the circumstances of the case, or the conduct and acts of the parties are repugnant to the credibility of the direct evidence.

THIRD REPORT OF THE COMMISSIONERS FOR CONSOLIDATING THE STATUTES.

To His Honour the Lieutenant-Governor of Ontario:

The Commissioners appointed for the consolidation and revision of the Statutes affecting the Province of Ontario have the honour to report as follows:

Since our last Report to your Honour the composition of the Commission of which we have had the honour to be appointed members, has undergone some change. The absence of the Chief Justice of Appeal is, in the first place, to be regretted. Mr. Justice Strong, has, since his elevation to the Bench of the Supreme Court, and consequent removal to Ottawa, been unable to take much part in the work; but early in the present year, Mr. Justice Moss consented to act; from about the same time His Honour Judge Gowan, a member of the Consolidation Commission of 1859, and, more recently, Mr. Vice-Chancellor Blake, have been rendering active assistance in the work of revision.

As soon as possible after the last Session of the Legislature, the Public General Acts of the Session were incorporated in the draft already prepared of the Public General Acts relating to matters within the authority of the Legislature of Ontario. The printing of the manuscript was then commenced, and has been continuously proceeded with during the last eight months, under the superintendence of Messrs. Langton, Biggar, and Kingsford, who, from time to time, submitted the draft while in galley form, to one or more of the other members of the Com-

mission for revision. As soon as this revision was completed, the matter was put in page form, and again submitted to the members of the Commission in order that it might receive further revision. When completed, an edition of 500 copies was issued, and distributed to the Members of the Legislative Assembly and to other persons likely to furnish suggestions with regard to any particular branch of the law.

We are glad to be able now to submit to your Honour a copy of this portion of the work.

This is only one of the three divisions of the statute law affecting Ontario, with which, by the Commission appointing us, we were empowered to deal.

We have already had the honour to submit with our second report a collection of Imperial Acts affecting Ontario, made by us in the performance of a second branch of our duty.

The third branch of the work entrusted to us was to examine and arrange all the Public General Acts of the late Province of Canada and of the Dominion, in force in Ontario, and relating to matters not within the legislative authority of the Provincial Legislature.

This portion of our duty was pursued to some extent; and a first part, comprising probably, a third of the collection, accompanied our second report, and was printed and distributed. The completion of this collection has been temporarily abandoned, in anticipation of a consolidation by the Dominion Government which will comprehend the Acts of which the Ontario collection would have been composed, and to ensure the completion, without delay, of the important portion of the Revision now submitted. A Table has been prepared, to be appended to the portion of the Revision which accompanies this report, giving a complete list of the Acts which were intended to be included in such a collection, which list, it is hoped, may be of some service until the Dominion consolidation is published.

In our first Report, with reference to the difficulties against which we have to contend, we had occasion to refer, amongst others, to those which arise from the creation by the British North America Act, 1867, of two distinct sources from which legislation affecting this Province may proceed. This feature in the present Revision has presented by far the gravest embarrassments. For instance, the British North America Act (s. 91), conferred upon the Parliament of Canada exclusive powers of legislation upon the following subjects:—

1. The regulation of Trade and Commerce.

2. Bills of Exchange and Promissory Notes.

3. Interest.

4. Bankruptcy and Insolvency.

but it is a matter of some nicety to draw the line which separates these matters from others in relation to which the Provincial Legislature may exercise exclusive powers of legislation.

The provisions in respect to which such questions arise, may be divided into the following groups:

1. Provisions constituting entire Acts:

2. Provisions consisting of portions of Acts forming substantive enactments, and not dependent for their meaning upon the context of the Act in which they occur:

3. Provisions consisting of portions of Acts so connected with the enactment in which they occur, as to be insensible if separated from it.

With respect to the first two groups, the mode in which we have dealt with them has varied according to the degree of doubt entertained with regard to them. Some have been omitted from the consolidation, as probably *ultra vires*; others have been consolidated, but, at the same time, we would suggest the expediency of excepting the original Acts or clauses from any general repeal that may be made of the law existing prior to the date upon which the Revised Statutes become law.

With respect to the third group (unless the questionable clauses come within the class relating to the Criminal Law, of which mention is hereafter made), it would seem proper to except the Acts in which the clauses occur, from any general repeal of the existing law, and to apply to the Dominion Parliament for such legislation as may be requisite.

One source of trouble, occasioned by the mode of distribution of the legislative powers in regard to the Criminal Law, requires special mention.

Amongst the subjects in regard to

which the exclusive power of legislation is assigned to the Dominion is, "The Criminal Law, except the constitution of Courts of criminal jurisdiction, but including procedure in criminal matters;" while in regard to one division of the Criminal Law strictly so termed, exclusive power of legislation is conferred upon the Provincial Legislatures, viz., "The imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province, made in relation to any matter coming within the classes of subjects within the exclusive legislative authority of the Province."

In almost every statute of the late Province of Canada, relating as a whole to matters within the authority of this Province, there are clauses designed for the effectual enforcement of the enactment, by declaring that the commission of a particular act shall be a misdemeanor, with the addition in some cases that the person convicted of the offence shall be punishable by fine or imprisonment, varying in amount of degree according to the nature of the offence.

The course which we have adopted, as the general rule in such cases, has been to employ language prohibiting the commission of the act, and to insert the punishment, if any, mentioned in the original section, as that to be inflicted for a contravention of the section of the Revised Statute, at the same time repealing the original statute. In some cases, however, where for other reasons the original of an Act in which such a clause occurs, is one proper to be excepted from any general repeal of the existing law, or where expedience seems to require that course, the clause has been printed in bourgeois type and in the form in which it was originally passed.

In dealing with provisions in respect to which no question of jurisdiction arises, the incorporation of amendments has not always been found easy. The difficulty has generally arisen where the amendment is not made in express terms, but is the effect of some subsequent provision enacted in a substantive form, and operating as a repeal of prior inconsistent enactments.

The importance of adhering as closely as possible to the exact words of the existing statutes is obvious. While fully recognizing the importance of this rule, we have considered that the too close observance of it might defeat some of the advantages to be derived from a consolidation, viz., conciseness and uniformity of expression. The Consolidation of 1859 by furnishing models of a more concise style of parliamentary drafting has had a considerable influence upon the form of subsequent statutes. Examples, however, of the verbose style of drafting, once so general, are still sufficiently numerous, and the variety of minds engaged causes a want of uniformity in style which is perhaps unavoidable under our system of legislation. To do otherwise than harmonize the various styles when reducing Acts of different dates into one statute, would be to produce a result not only illogical and inelegant, but also involving uncertainty as to the construction of the enactment, inasmuch as the employment of different language in the same Act should indicate a difference of meaning. Our aim has therefore been, while preserving the sense and general form, and as far as possible, the language of an enactment, to secure conciseness, uniformity and clearness, and we have attempted to do this by pruning freely—omitting useless words—subdividing long sections or Acts—converting provisoes, where inaptly introduced, into exceptions, conditions, or substantive provisions qualifying a more general clause—transposing sections and clauses—and often arranging a whole Act in whatever order seemed best, without observing that in the original, if it appeared susceptible of improvement. In a few instances where amendments have been numerous or conflicting, it has been necessary to completely recast the whole matter. The separation of subjects unconnected with each other has been preferred to economy of space; and difference of type, the division of long sentences into paragraphs, and other typographical expedients have been employed to faciliate the understanding of a clause by a clearness of arrangement appealing to the eye.

In the Consolidation of 1859, the first general employment was made, in our statutes, of the present instead of the future tense, but this change was not extended to the Acts relating to real property. We do not think there is anything special in those Acts which renders it now necessary to apply to them a rule

charge, accordingly, took priority of the charge in favour of the bank. "It is impossible," observed Lord Selborne, C., "to see the injustice sometimes done by this class of cases without finding cogent arguments for an improvement in the law as to the title to real estate, in order to get rid of the difficulties arising from there being a legal and equitable title, and of the necessity of deducing title by long and complicated abstracts." It was strongly urged that the result of deciding in favour of the prior charge, and for that purpose resuscitating a venerable instrument bearing date Anno Domini 1774, would be, moreover, that many equitable mortgages might be made of the same estate, and the holder of any one would ever be subject to be turned round by some unsuspected prior charge, unregistered, and it may be from its particular nature incapable of being registered: see *M'Kinney's Estate*, 6 Ir. L. T. R. 179, *passim*. Admitting the indubitable truth of this possible result, Lord Romilly observed that the sole answer to the objection is, that the person who lends money on this species of security must take care to be the first of such incumbrancers; and, if he cannot be sure of this, he must not advance his money without the security of a legal mortgage: 21 L. T. N. S. 753. Certainly, in effect, it would appear to be eminently perilous to lend money upon equitable securities. But, as Turner, L.J., observed in *Cory* v. *Eyre*, 1 De G. J. & S. 169, "if equitable securities are to be made perfectly safe, it must be done by the Legislature. We cannot alter the law." The first question, of course, in such cases will be, did that take place which was sufficient to vest an equitable estate? "It is extremely difficult to determine the question of what it is, provided that it be a material deed, that will create an equitable mortgage," declares Lord Romilly; but, then, "'material' means only that it must be a deed relating to the property," and by no means necessarily a deed upon which the title depends. And the authorities have gone the length of holding that, when the Court is satisfied of the good faith of the party who, between himself and the owner, had a prior equitable charge in point of time—when there has been a positive statement, honestly believed, that he had got the necessary deeds—that he is not bound to examine the deeds, not bound by notice of their actual contents being unexamined, or by any deficiencies which, by examination, he might have found in them, and that this is so even where the depositor was himself acting in the double capacity of borrower of the depositee's money and solicitor for the depositee, as in *Colyer* v. *Finch*, 5 H. L. C. 905, 924, 928, and *Hewitt* v. *Loosemore*, 9 Hare, 449. Many grave considerations are, accordingly, opened up by the decision of *Dixon* v. *Muckleton*. But that, in particular, which we here desire to note that it enforces is, the exigency of looking more strictly than is usual in practice into the remoter history of title, and of not ignoring the existence of muniments no matter how antiquated, and, in one sense, immaterial. And if, in the result, abstracts should come to resemble the "Encyclopædia Britannica" as it might appear in manuscript, and if the archives of the muniment-room should increase and multiply till, as Hamlet observed, pointing to the coffin of the lawyer, "the very conveyances of his lands will hardly lie in this box," the lawyers alone are not to blame, should that result remain unremedied. It lies with the public to expedite redress, and with the Legislature to provide it.—*Irish Law Times.*

THE ORIGIN OF PARLIAMENTARY REPRESENSATION IN ENGLAND.

(*By Edward A. Freeman, D.C.L.*)

When the painter Hayden ended his troubled life, the picture on which he was engaged was "Alfred and the first British Jury." In that day perhaps few were struck by the grotesque incongruousness of the title. It probably struck but few that, if Alfred brought together any jury, it was at all events an English jury. It struck but few that to any Englishman from the days of Alfred till deep into the eighteenth century, a "British jury" would have conveyed no meaning but that of a jury of Welshmen. But this is not the main point. The more wonderful thing is that any body could ever believe that Alfred invented trial by jury, or indeed that, in the sense in which it was meant, any body ever

got warm in my bed in the house of Dr. S——, in Coleraine, where I was serving my apprenticeship, when I was roused out of my sleep and ordered to saddle the doctor's horse and my own pony, and bring them round to the door immediately. When I got there the doctor was ready, and we rode to the village of Bushmills, seven long miles, in an awful night of rain and storm. The doctor alighted at Peggy M'Parland's inn, which he entered, leaving me outside to take care of his horse, where I remained for four long weary hours, walking his horse up and down Bushmills-street, and not a dry thread on my back. When the doctor came out of the inn he told me that a gentleman and his wife had been travelling along the coast, and stopping at Bushmills the lady had been taken suddenly ill, and had just been safely delivered of a baby. My lord, I am glad to see that baby before me now as Chairman of the House of Lords; but pardon me if I say that the pleasure would have been greater if your lordship had not differed from me on a point of great importance to my constituents of Coleraine.' As I proceeded with my story I saw a quiet smile spreading gently over his Lordship's features; and ever after when I happened to meet Lord Redesdale in the lobbies at Westminster, he would approach me in the kindest manner, and say, 'Well, Dr. Boyd, glad to see you; sorry you had so much trouble with me the night I was born.'"—*Irish Law Times.*

MODERN ENGLISH LAW.

The history of modern English law is the history of a gigantic revolution produced by the ideas of one man. Under the influence of Bentham, half a century or more of stagnation has been followed by half a century of innovation. It is a little difficult for those who live in the midst of incessant legal changes to appreciate the extent of a revolution of which the force is still unspent. Something may be achieved by the aid of a comparison. Any one, for example, who examines the English statute book for the century and a quarter which precede 1825, will see that the changes which it includes are not equivalent to a tenth part of the alteration, which have been effected within the last half century. Hardly a single portion of English law has, since George the Fourth came to the throne, escaped the influence of reform. The constitution of Parliament has been changed, the laws of treason has been modified, the criminal law has been transformed from a system of indiscriminate inhumanity into a system under which capital punishment is, except in cases of murder, practically unknown. The laws of debt have been fundamently modified; the whole law of evidence has been freed from the artificial rules by which it was defaced; the expression of opinion has been freed from all the shackles imposed by the law and from nearly all the checks imposed by opinion; all the forms of monopoly supported either by statute or by judicial decisions have been swept away, and the principles summed up under the vague formula of "free trade" have been embodied in the legislation of the last fifty years. Other changes might be easily enumerated, but one crucial instance of the readiness with which modern English law admits of alteration or improvement may stand for a hundred examples. The institution of the Divorce Court effected not merely a change in legal procedure but an alteration in the theory of marriage. It touched one of the most sensitive points of private life. It involved the national renunciation of ecclesiastical dogmas which had been more or less respected for centuries. Yet the Divorce Court was instituted not only without revolution, but without exciting any strong popular emotion. In 1859 it was more easy to alter the law of marriage than it would have been in 1759 to abolish capital punishment for shoplifting. The extent of the legal revolution of which Sir R. Wilson is the historian may also be measured by comparing not century with century but country with country. France has, since 1826, passed through at least four revolutions, but the legislative changes introduced into French law since that period fall far short, it may be conjectured, of the innovation carried out within any given ten years by the English Parliament. France it may be said, did all her innovation at a stroke. The first revolution effected such fundamental alterations that nothin was left for later reformers to accomplish

grown, without any breach of historical continuity, into the political institutions alike of the second England within the isle of Britain and of the third England beyond the ocean.

Let us take for instance one point of which I have already spoken. The legislative bodies of the United States, of most—I believe of all—of the several States, consist of two Houses. The fact is so familiar that we hardly think about it. We almost take it for granted as the natural form of a legislature. It is assumed that there must be one House chosen by a popular election and another which comes in some other way; whether by hereditary succession, by nomination, or by some less popular mode of election, does not matter for the moment. This form of legislature has been imitated in endless states, both monarchies and commonwealths, and we have just seen the greatest of European commonwealths, after trying an Assembly of one chamber, deliberately fall back on an Assembly of two. But it is certain that, in most of the cases where the English and American system of two chambers has been imitated, the second or upper chamber has been found to be the weakest part of the constitutional system. It is ever the first to give way when any violent strain is brought upon it. The reason is palpable. It is weak because it is artificial. It is weak because it does not come of itself, but it is simply an ingenious device which it is thought will tend to the better working of those parts of the constitutional system which do come of themselves. For we may fairly say that in any form of free government the executive branch and the popular branch do come of themselves. That is to say, there may be questions as to the best form to give them; but they must be there in some form or other.

But a second Chamber is not thus a matter of necessity. The State may work better with it, but it can get on without it. Being thus an artificial creation instead of an indispensable element, a luxury of constitutional government and not a necessity, it has not the same firm ground to stand upon as either the executive or the popular branch. But it is at once plain that, while a great number of other second Chambers have risen and fallen around them, the House of Lords of the United Kingdom and the Senate of the United States have gone on untouched. And the reason plainly is because neither of these is an artificial creation in the same sense as the Upper Chambers which have risen and fallen in France and Spain. The English House of Lords in the strictest sense came of itself. A long course of historical causes gave it its present shape; but neither Alfred or any other man invented it out of his own head. The second chambers, both of the United States and of the separate States are, as I have already said, not imitations but continuations. They are at most transplantations of the English constitution in forms modified by new circumstances. But mark this further—a point which I have insisted on in other writings, but which I must here insist on again—that in a Federal State, the Senate or other upper chamber is not a mere artificial institution. It is not a constitutional luxury, but as necessary a part of the constitutional system as the executive or the popular branch. In a single state, whether monarchy or commonwealth, the question of a second chamber is simply the question whether the work of legislation will be better done with it or without it. In a Federal state the two chambers are equally necessary. One is needed to represent the body of the united nation, the other to represent the several States in their separate character. If a Federal legislature consisted only of a Senate or only of a House of Representatives, one or the other of the necessary elements of a Federal system would be overridden. And this truth has been recognized by the close reproduction of the American Senate in the democratic Federation of Switzerland, and by as near an approach to it as monarchic forms will allow, in the Imperial Federation of Germany. These two last may be called imitations; but they are imitations in a good sense; they are reproductions of an institution which experience has shown to be necessary in a Federal state. But though the Senate was thus a necessary feature of the American Federal Constitution, we may be pretty sure that the authors of that Constitution would not have invented it of their own heads. No such institution was to be found in any earlier Federal system, not in that of Achaia itself. Its introduction is in

One cause at least of the failure of attempts to codify the law, lies in a feature of the Benthamite movement, which has received insufficient atttention. Bentham's disciples were compelled to carry out their reforms by means of the only instrument which lay ready to their hands. This instrument was the British Parliament. Now, the House of Commons has great merits. Its main function is to represent English opinion, and this function it admirably performs; but its other and subordinate functions is to legislate, and this subordinate duty it performs, and always will perform ill. Parliament, moreover, had till within the last fifty or sixty years, never been habitually employed as what may be termed a law making machine. The long roll of the statute books gives an exaggerated idea of the amount of legislation actually turned out by Parliament. Many of the acts enrolled among the statutes are merely administrative measures. There are, indeed certain law-making epochs, such, for example, as the reign of Edward I or Henry VIII, but on the whole, the quantity of legislation, at any rate affecting private law, was, down to the present century, much smaller than is easily believed by a generation accustomed to see each session produce a good sized volume of new law. In early times, further, Parliament had little concern in the drafting of acts, and down to a quite modern period the discipline of party checked the indiscriminate legislative activity of individual members. At the time when Bentham commenced his career, legislative changes were rare. Innovations came not from St. Stephen's but from the Court of Queen's Bench, and the judge-made law of Lord Mansfield, may compare favorably with the work of parliamentary reformers. Law made by judges has defects, but it has the merit of being made by men who understand the system which they mean to improve. The inevitable result of the general effort to improve the law was, as already pointed out, to work the parliamentary machine for a purpose to which it was not properly adapted. The effect has been that the work turned out has been marked by the merits and the defects of the machine which produced it. The public wished for the abolition of various abuses. Parliament, representing the public, has abolished these abuses; and wherever the mere repeal of bad laws was all that was needed, Parliament has done all that the occasion required. But the careful statement of complex rules in precise language, which constitutes the essence of codification, is not a matter in which electors can be interested. If the constituents, indeed, should by any chance clamor for a code, Parliament would be itself unable to provide it. Parliament might conceivably delegate its powers to competent persons; but as members, like all other men, love power even which they can not use, they will not, except under extreme pressure, delegate to others the glory of making laws. This pressure has never arisen. Hence, while the substance of the law has been remodelled, its form has been hardly improved. In India, Englishmen can make a code, but in India Englishmen are despots. The man who could easily carry a whole code through the council at Calcutta, would probably fail in getting a single clause of a bill through the House of Commons. Other causes, no doubt, have contributed to the failure of English reformers to produce a code, but the nature of the House of Commons is the most obvious cause of their want of success. To the fact, at any rate, that the reforms which mark the history of modern English law have not been embodied in a striking form, must be attributed the comparatively small amount of fame which has fallen to the share of Bentham and his disciples. To compare Napoleon as a jurist with Bentham, would be as absurd as to consider whether Bentham equalled Napoleon as a general; but the French emperor, who could plunder the fruits of other men's labors will go down to posterity with his code in his his hand; the English jurist will never be known to any but students. A story is current of Bentham's predicting to a friend that in the next generation he would be seated on a throne giving laws to England. The prophecy has been half fulfilled. He now legislates for England, but he has not received his throne.—*N. Y. Nation.*

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(Reported for the *Law Journal*, by E. Sydney Smith, Student-at-law).

The Manufacturers and Merchants Fire Insurance Co. v. Attwood.

A. J. Act, 1873, *sec.* 24—*Examination*—"*At issue.*"

Held, that an order of reference after declaration filed, and before issue joined has not the same effect as a oinder so as to enable either of the parties to examine the other under the A. J. Act.

[October 31, 1876.—Mr. Dalton.]

After the declaration had been filed and before issue was joined, the case was ordered to be referred to arbitration. The plaintiff then obtained an order to examine the defendant under the A. J. Act, whereupon the defendant took out a summons to set this order aside.

J. H. Ferguson shewed cause. The order of reference has the same effect as a joinder of issue; see Brown's Law Dictionary, p. 105, and *Bacon* v. *Campbell*, 6 Prac. R. 275, where the examination of a defendant in ejectment was allowed, although no appearance had been entered by him. The case is at issue, within the meaning of the Act, when the pleadings are concluded, as the object of the A. J. Act in not allowing examination before issue joined was merely to prevent fishing applications.

Mr. Madden (Bethune, Osler and Moss) contra. The words "at issue" have a technical meaning, and must be interpreted strictly.

Mr. Dalton said that, although, he would have preferred to allow the examination if he could have seen his way to do so, considered that the words "at issue" had a technical meaning which he could not disregard.

Order accordingly.

Le Mesurier v. Tierney.

Hab. fac. poss.—Lands detached from one County and attached to another.

Judgment in ejectment in 1867 for certain lands in County of Northumberland, and *hab. fac. poss.* to the Sheriff of that county who executed the writ. Subsequently, the land sold, was by proclamation of the Lieutenant-Governor, detached from the County of Northumberland, and incorporated with the Village of Trenton, in the County of Hastings.

Held, that plaintiff might enter a suggestion of the facts upon the judgment roll, and issue an original writ of *hab. fac. poss.* to the Sheriff of the County of Hastings.

[December 2, 1876.—Mr. Dalton.]

A summons was taken out calling upon the defendant to show cause why the plaintiff should not have leave to enter upon the judgment roll a suggestion, that since the issuing of execution in this cause, the land in question in this suit had been by proclamation of the Lieutenant-Governor in Council detached from the County of Northumberland, and incoporated in the Village of Trenton in the County of Hastings; and why a writ of *hab. fac. poss.* should not issue to the Sheriff of such County.

Osler shewed cause.

Clarke contra.

Mr. Dalton thought it was a proper case for an application, and granted the order in the terms of the summons.

Order accordingly.

Ray v. Briggs.

Application to sell land under A. J. Act, 1873, *secs.* 35, 36, 37—*Issue directed.*

[October 29, 1876.—Mr. Dalton.]

Judgment had been recovered against defendant and execution returned *nulla bona.*

Osler obtained a summons to sell the lands under A. J. Act, 1873, secs. 35, 36 and 37, on the ground that the lands had been conveyed by the defendant to his wife before judgment to delay hinder or defraud creditors.

Watson shewed cause, and read several affidavits which stated that the conveyances had not been made with any fraudulent intent.

Mr. Dalton.—I do not think I should exercise the powers given by the statute to dispose of the matter summarily in Chambers, as the interests involved are of much importance. I will direct an issue to be tried between the parties as provided by the 37th section of the Act. *Order accordingly.*

Purser v. Bradburn.

Costs—Certificate—Title.

Held, that in a plea of *non demisit* to a count in covenant, a question of title arises, which entitles the plaintiff to superior Court costs, although no certificate be granted.

[December 16, 1876.—Wilson, J.]

The action was brought by a tenant against his landlord for breach of covenant for quiet enjoyment; there were also two counts in tres

pass. The defendant pleaded to the count on the covenant, *non est factum* and *non demisit*, and to the counts in trespass, not guilty. The plaintiff obtained a verdict for one shilling. No certificate for costs having been granted by the learned Judge who tried the cause, the taxing officer refused to tax the plaintiff his cost of suit. A summons was taken out to review the decision of the taxing master.

W. S. Smith shewed cause.

Creelman supported the summons. The question of title arises under the plea of *non demisit* which ousts the jurisdiction of the County and Division Courts, and therefore no certificate was necessary.

Wilson, J., allowed the appeal.

Order accordingly.

Regina v. Clancy.

Vagrant Act—32, 33 *Vict. cap.* 28—*Justice of the Peace sitting for Police Magistrate.*

Held, that a conviction by one Justice of the Peace under the Vagrant Act is bad.

Quere. Whether if the Justice of the Peace were sitting for and at the request of a Police Magistrate, the conviction would be good.

[December 12, 1876.—Wilson J.]

The prisoner was arrested in the town of Belleville without any warrant having been issued for his arrest, and was tried before one Mackenzie Bowell, Esq., a Justice of the Peace for the County of Hastings, who convicted him of being a common vagrant, under 32 & 33 Vict. cap. 28, and committed him to the common gaol for the term of six months with hard labour.

J. B. Clarke having obtained from Mr. Justice Wilson a writ of *habeas corpus*, on the return of the writ, moved for the discharge of the prisoner on the ground that the committing magistrate had no jurisdiction under the Act, that the powers of such Act required to be exercised by a Stipendiary or Police Magistrate, Mayor, or Warden, or two Justices of the Peace.

Capreol for the Attorney-General, asked for an enlargement to file an affidavit shewing that Mr. Bowell was sitting for, and at the request of the Police Magistrate when he convicted the prisoner.

Wilson, J.—The conviction having been made by only one Justice is bad, and I must discharge the prisoner. Admitting that the Justice of the Peace was sitting at the request of the Police Magistrate, I doubt whether that would get over the difficulty.

Prisoner discharged.

GENERAL SESSIONS OF THE PEACE FOR THE COUNTY OF ELGIN.

Regina v. Bradshaw—In the matter of Appeal between Henry Bradshaw, *Appellant*, and Richard B. Nicholl, *Respondent.*

Summary conviction for destroying a fence under 32 & 33 Vict. cap. 22, D. sec. 29—Malice.

The defendant Bradshaw had buried a child in a graveyard near the remains of his own father. The complainant Nichol had a parcel of ground which the sexton of the church had appropriated to his exclusive use without any authority from the incumbent or church wardens. The complainant subsequently extended his fence, by the like consent of the sexton only, and enclosed more ground, so that the fence crossed diagonally over the grave of defendant's child; defendant remonstrated, but obtaining no redress, or a removal of the fence, proceeded to remove it himself. In process of doing so he broke a marble pillar of complainant's fence, for which he was summoned before the Police Magistrate of St. Thomas, for "wilfully and maliciously" destroying a fence under sec. 29 of 32 & 33 Vict. cap. 22, D. He was fined $10, and ordered to pay for the damages. From this conviction the defendant appealed to the General Sessions of the Peace.

Held, that although the defendant was guilty of trespass, for which he might be mulcted in damages in a civil action, he was not liable to a fine, and that, acting under a claim of right, the act was not necessarily *malicious.*

[St. Thomas, Jan. 15, 1876.—Hughes, Co. J., Chairman.]

This was an appeal from a conviction by the Police Magistrate of the town of St. Thomas, for unlawfully and maliciously breaking down and destroying a fence in a graveyard under sec. 29, of 32 & 33 Vict. cap. 22, D.

J. McLean for appellant.

Horton for respondent.

The judgment of the Court was delivered by

Hughes, Co. J., Esq., Chairman.—This appeal is in the nature of a new trial. We think the only important point for consideration is whether the act complained of was *maliciously* done.

There can be no question whatever that it was unlawful, and that the appellant would have been liable to damages in an action of trespass, but it must have been maliciously done or the conviction must fall. The proceeding before the Police Magistrate was one not only seeking for damages to be awarded to the respondent, but for a penalty to be inflicted besides: the one for the unlawfulness of the act and redress of the private injury to the property of the respondent, the other as a punishment or penalty for the alleged maliciousness of it.

It was urged upon us by counsel very strongly at the trial, that the act was "maliciously," and even *vindictively* done, for which he pressed the enforcement of the penalty as well as the damages. He also urged that as it was not necessary to prove express malice, and that where an act was of such a nature as could spring from *no other than a bad motive*, and calculated to inflict injury without cause or justification, malice would be implied from the act itself. But it is just as broadly laid down that if there be some other than *a bad motive* for the doing the act, the necessary consequence of which is an injury to another person, it may be done under such circumstances as negative malice. Thus if an act injurious to another be done under a *bonâ fide* claim of right it will not come within the statute.

As the case was more a matter of fact for a jury than a question of law for the Court, we urged the parties to have a jury empanelled to try it on its merits—but the counsel for the respondent refused to have a jury, insisting that it was a matter which the Court ought only to decide; we therefore find ourselves unpleasantly called upon to decide the merits of a case which has evidently caused some heat between the parties from its very nature. When the appellant sought to remove the fence, it is evident to us from the evidence that his intention was only to remove it from over the grave of his child—not to break or destroy it. That he did break it in the process of removal, there can be no question, and that for breaking it, the respondent was entitled to damages against the appellant as a trespasser, but that belongs only to a civil court and not to a *quasi* criminal tribunal, for it does not follow that because destruction resulted from an illegal act, *malice* is to be implied; unless *malice* can be inferred from the inception of the matter, it cannot be imputed by the mere result, or after an act is accomplished; malice can only flow from the *animus* in which an act is conceived, and not from the consequences merely. In this case the appellant, when remonstrated with by the sexton for what he had done, insisted upon his right to do the act.

Rex v. *Reynolds, alias John Diel*, Russ & Ry. C.C. 465, was a case illustrating this principle, and we think must determine this case, *i.e.* whether in fact this act of the appellant was maliciously done. That was an indictment under 52 Geo. III, cap. 148, for shooting at a vessel of the Customs, and also at an officer of the same on the high seas. [The learned Chairman then cited the case at length]. It appears from this case that the surrounding circumstances (where it is essential to prove malice) must be examined and considered in all cases. The maxim, "*actus not facit reum nisi mens sit rea*," applies here, and we think that as in that case, so in this, the intention and not the result must be the point on which the case ought to be determined.

Although the appellant here was clearly a trespasser, and in the wrong, as regards this whole matter about removing the fence and the consequences which followed from his illegal act, still he insisted upon his right to do it. However mistaken he might have been, we do not see that express malice, within the meaning of the statute under which he was convicted, has either been proven, or that malice can be inferred from those facts, or that (as strongly urged upon us by the counsel for the respondent) the acts of the appellant exhibited either "vindictiveness" as he called it, or maliciousness. Had a jury been empanelled to try this case, we think that under a fair charge they might have reasonably been expected to find a verdict which would have had the effect of quashing this conviction on the merits. And we think that acting as a jury as well as a Court of law, we ought to do the same.

We therefore order that the said conviction shall be, and it is hereby quashed; and we also order the respondent to pay, on notice of this order, the costs of this appeal, amounting to and taxed at the sum of $25.60, to the Clerk of the Peace, to be by him paid over to the appellant forthwith, and that the sum deposited by the appellant instead of a recognizance, he repaid and returned to him—by the Police Magistrate.

The case having been removed by certiorari into the Court of Queen's Bench.

Hodgins, Q.C., moved (before a single Judge) for a rule *nisi* calling upon Bradshaw to shew cause why the judgment of the Court below should not be quashed. The Judge having reserved the case, on a subsequent day refused the rule.

Hodgins, Q.C., subsequently moved by way of appeal to the full Court.

Last Term the full Court refused a rule *nisi*.

INSOLVENCY CASES.

In Re Frederick Dangerfield *Insolvent*, Matilda Dangerfield, *Claimant*, and Meikle et al, Inspectors, *Contestants*.

Wife of Insolvent proving claim.

The claimant was the wife of the insolvent, and claimed to prove against his estate for money lent and in-

terest thereon. The contestants disputed the claim. The judge having found all questions of fact in favor of the claimant.

Held, that the fact of the claimant being the wife of the insolvent did not debar her from proving against his estate as a creditor, but *held*, that under the circumstances the question was a fair one for judicial enquiry, and no costs were allowed the claimant.

[Brockville, McDonald, J.J.]

The insolvent made an assignment in April, 1875, and amongst other claims filed against his estate was one of his wife.

1871, April 20,	To money lent.....	$1300 00
	To five years interest on same at 6 per cent per annum..	390 00
		$1690 00

The inspectors of the estate contested the claim and put in thirteen grounds of objection, which may be summarised as follows: 1. Claimant was wife of insolvent, and not entitled to rank; 2, payment; 3, that the moneys were a gift to insolvent from his wife; 4, that claimant allowed insolvent so to deal with the moneys, that between him and his creditors, other than claimant, the property purchased therewith, became the property of insolvent, and it would be a fraud upon other creditors to allow her to rank equally with the others; 5, never indebted; 6, moneys belonged to insolvent; 7, the claim was a fraud upon creditors other than insolvent; 8, the moneys claimed were proceeds of equity of redemption in certain lands sold by one W. McC. under mortgage from insolvent, or balance or residue of the proceeds of sale of land, after debt and costs of W. McC., and it would be a fraud upon other creditors to allow the claimant to rank &c.; 9, claim did not accrue within six years before assignment; 10, claim did not accrue within six years before filing of claim; 11, claimant, at time alleged debt was contracted, was in possession of property of insolvent of an equal or greater value than amount claimed; 12, the moneys were trust funds, and insolvent never received benefit from, or had the use of the moneys; 13, that the moneys were lent by claimant to enable her to rank.

The claimant in her answer admitted being the wife of the insolvent but denied all the other allegations of contestants, and issue having been joined, the matter was brought for trial before the Junior Judge of the County Court of the United Counties of Leeds and Grenville.

The evidence was to the effect that insolvent at one time owned some real estate in Brockville, which he mortgaged to his wife's brother one W. McC., and subsequently sold and conveyed to him absolutely. Several years afterwards W. McC. sold the property, and after taking an account of all it had cost him, found that he had about $1300 to the good, and in 1871, made a present of this amount to his sister, the wife of the insolvent, who loaned it to the latter, there being no memorandum or writing to evidence the loan, but insolvent promising claimant that he would give her as much for it as any one else would, and at all events 6 per cent. The contestants contended that the insolvent had an equity of redemption in the real estate, and that the $1300 really belonged to him and was not W. McC.'s to give.

The judge found all the facts in favor of the claimant.

The contestants urged that notwithstanding the finding of the judge, the claimant could not recover, and judgment was reserved, pending argument.

On a subsequent day the parties appeared by by counsel.

French for the contestants, contested that the Married Woman's Act of 1859 did not apply to Mrs. Dangerfield who was married before it was enacted. He cited *Commercial Bank* v. *Lett*, 24 U.C. Q.B. 552; Story's Equity Jurisprudence, 1374, ; White & Tudor's Leading Cases 457, 459, 540; *Gardner* v. *Gardner*, 5 Jurist, N. S. 975; Lewin on Trusts, 550, 537 and 552; *Kerr* v. *Read*, 23 Grant 529; *Scott* v. *Hunter*, 14 Grant 377; *Healey* v. *Daniels*, Ib. 638; *Buckland* v. *Rose*, 7 Grant 440.

Senkler for claimant referred to White & Tudor's Leading Cases 447: *Woodward* v. *Woodward*, 9 Jurist N. S. 882, Story's Equity Jurisprudence, 1373.

McDonald, J. J. gave judgment in favor of the claimant, but held that the case was a proper matter for enquiry, and that, under the circumstances, the inspectors were justified in contesting the claim, even although they had done so unsuccessfully. He allowed no costs to the claimant, but allowed the inspectors their costs out of the estate.*

* In the same matter was a claim for wages, and for money lent to insolvent by the son of insolvent, who was an infant. The inspectors of the estate having disputed the claim, and all the facts having been found in favor of the claimant.

Held, that the claimant was entitled to prove against the estate, that his being an infant did not preclude him from recovering from his father, the contracts having been proved.

MUNICIPAL ELECTION CASE.

In the Matter of the Election for the Office of Reeve for the Township of Edwardsburgh for the Year 1877.

Upon an application for a judge's order for the inspection and production of ballot papers used in the election of a Reeve, such application being made under the provisions of section 28 of the Act 38 Vict., cap. 28, O., and neither a prosecution for an offence in relation to ballot papers, nor proceedings for the purpose of questioning the election on return having been instituted, *held*, that the order could not be granted.

[Brockville, McDonald, J. J.]

A summons was obtained from the Junior Judge of the County Court of the United Counties of Leeds and Grenville on behalf of James Millar the unsuccessful candidate for the Reeveship of the Township of Edwardsburgh, calling upon one Joseph Craw Irvine, the successful candidate, and Gideon Fairbairn, clerk of the said Township, to show cause why an order should not be made directing the inspection and production of the ballot papers used in this election.

The summons was granted upon an affidavit of Mr Millar, showing that he was a candidate for the Reeveship; that the only other candidate was Joseph Craw Irvine, and that, as appeared the return of the Clerk of the Township, Mr. Irvine was elected to the office by a majority of three votes; that deponent believed that such return was not the true and correct return of the vote of the electors polled, and that he believed an inspection and a count of the ballot papers would show that the return of the clerk should have been in his (Millar's) favor, rather than his opponent's; that he was informed and believed that at certain polling sub-divisions in said Township to wit, at sub-division No. 6, certain ballot papers were rejected which should have been counted in his favor, and the votes which they represented added to his count; and that he was advised, and believed that the inspection and production of the said ballot papers were material for the purpose of questioning the election and return.

J. Reynolds, on behalf of Mr. Irvine, showed cause, and, amongst other objections, urged that the order asked for could not be granted until a petition had been filed.

M. E. O'Brien supported his summons.

McDonald, J. J.—The 28th Section of the Act, 38 Vict. cap. 28, O., provides that no person shall be allowed to inspect any ballot papers in the custody of the Clerk of the municipality, except under the order of a Court or Judge of competent jurisdiction, to be granted by the Court of Judge on being satisfied by evidence on oath that the inspection or production of such ballot papers is required for the purpose of maintaining a prosecution for an offence in relation to ballot papers, or for the purpose of a petition as to an election or return.

Mr. Reynolds, for Mr. Irvine, the Reeve elect, admits that I am a "Judge of competent jurisdiction," but contends that the order asked for cannot be made, unless a petition questioning the election or return shall first have been filed, and which has not in this case been done. After considering the matter very fully, I have been unable to arrive at any other conclusion than that this contention is correct. I do not think that the Legislature can have intended that a production and inspection of ballot papers should be permitted merely for the purpose of allowing a party to inform himself whether there exist grounds for contesting an election. I have doubts whether a Court or Judge is clothed with power to make an order under the above mentioned 28th section, unless and until a prosecution has been instituted for an offence in relation to ballot papers, or the proper proceedings for the purpose of questioning an election or return have been commenced under the Municipal Institutions Act, although possibly in the former case he may have such power, (see 37 Vict. cap. 5, sec. 23, O.) And it is questionable whether the evidence on oath required under the 28th section to satisfy the Court or Judge could, in many cases be obtained, or be compelled to be given before one or other of the above steps be taken.

I must therefore decline to grant the order for inspection and production of ballot papers asked for in this matter.

Summons discharged.

DIGEST.

DIGEST OF THE ENGLISH LAW REPORTS FOR AUGUST, SEPT., AND OCT., 1876.

From the American Law Review.

Action against Public Officer.—*See* Frivolous Suit.

Annuity.—*See* Residuary Legatee.

Arbitration Clause.—*See* Covenant.

Bailment.

1. Plaintiff left two parcels worth £60 with a servant of the defendant railway company,

paid for their deposit without declaring their value, and received therefore a ticket headed "Luggage and cloak office," and bearing on its face, in plain type, a reference to conditions on the back. Among these conditions was one stating that the company would not be responsible for more than £5 value, unless the extra value was declared and paid for, and that "the company will not be responsible for loss of or injury to articles except left in the cloak-room." Plaintiff knew there were conditions on the ticket, but did not know what they were. The parcels were left by the servant in an exposed place, instead of putting them in the "Luggage and cloak office," referred to on the ticket, and a thief made off with them. *Held*, that the plaintiff could not recover although the parcels were not put into the cloak-room, because the conditions on the ticket were binding, and the plaintiff must be held to have had knowledge of them.—*Harris* v. *The Great Western Railway Co.*, 1 Q. B. D. 515.

2. Plaintiff left his bag, worth £24 12*s.*, at the cloak-room of defendant's station, and received a ticket therefor, on the face of which was the date and number of it, and the time of opening and closing the cloak-room, and the words "See Back." On the back it was stated that the company would be responsible only to the amount of £10. There was also a notice to this effect hung in the cloak-room in a conspicuous place. The jury found as a fact that the plaintiff did not read his ticket, and did not know of the condition on the back, and that, as a reasonably careful man, he was under no obligation to make himself aware of said condition. *Held*, that the company was liable for the value of his bag. *Parker* v. *South-Eastern Railway Co.*, 1 C. P. D. 418.

Banker.—*See* Bills and Notes, 3.

Base Fee.—*See* Tenant in Tail.

Bill of Lading.

By a bill of lading, 306 packages of tea, shipped on board the *Medway* at London for Montreal, for the appellants, were "to be delivered from the ship's deck where the ship's responsibility shall cease at the port of Montreal . . . unto the Grand Trunk Railway, and by them to be forwarded thence to the station nearest Toronto, and at the aforesaid station delivered to" the appellants or their assigns. There was a list of exceptions to liability, and then the clause, "No damage that can be insured against will be paid for, nor will any claim whatever be admitted, unless made before the goods are removed." The ship arrived May 2d or 3d. The tea was unloaded and placed in shipping-sheds. From the shipping-sheds it was removed to the railway freight-sheds on the 6th, 9th, and 12th of May, and delivered at the appellant's warehouse in Toronto on the 13th, 16th, and 17th of May. The shippers were informed by the appellants of damages to the tea on the 30th of May. *Held*, that the clause, "Nor will any claim whatever be admitted unless made before the goods are removed," referred to the removal of the goods from the railway station rather than from the ship, and that not merely patent damage, but latent damage, that an examination at the station would have revealed, was meant. Appeal dismissed.—*Moore* v. *Harris*, 1 App. Cas. 318.

Bills and Notes.

1. 16 & 17 Vict. c. 59, §19, provides, that, if a check is presented to a bank "which shall, when presented for payment, purport to be indorsed by the" payee, the bank shall not be liable by paying the same, &c. Plaintiffs did business in their own name, and also as "S. & Co., Agent K." In payment for goods bought of the latter concern, defendants gave checks payable to "S. & Co. or order," to K., who indorsed the checks: "S. & Co., per K. Agent," got the money, and misappropriated it. *Held*, that the defendants were not liable to the plaintiffs in any form.—*Charles* v. *Blackwell*, 1 C. P. D. 548.

2. The plaintiffs in New York purchased a draft of S. & Co. for £1,000 on S., P., & Co in London, payable to the order of the plaintiffs. They indorsed it to W. & Co., of Bradford, England, and enclosed it in a letter to W. & Co. for transmission. The letter was placed in the "Letter Box" in the plaintiffs' office, where their letters for the post were usually put. It was stolen by one of their clerks whose duty it was to take the letters to the post-office, and in the course of a fortnight it was presented to defendants' bank, with a forged indorsement by W. & Co. to C. or order, and the blank indorsement of C., the bearer. Defendants received the draft, stamped it with their bank stamp, sent it to S., P., & Co., got the money on it, and turned the money over to the bearer. Evidence was offered at the trial to show that it was the general custom to send a letter of advice with a draft, or on the next steamer when a foreign remittance was made. This evidence was rejected. *Held*, that an action for money received to the plaintiffs' use would lie; that there was no evidence of negligence to stop the plaintiffs from setting up their title to the draft; and that the evidence in question was properly rejected.—*Arnold* v. *Cheque Bank*. *Same* v. *City Bank*, 1 C. P. D. 573.

3. A check drawn by the plaintiff on M. & Co., his bankers, payable to the order of P., and crossed "L. and C. Bank," was stolen from P., and his indorsement forged. It was then offered to defendant, who, after telegraphing to M. & Co., and received word that the check was good, took it in good faith and gave it to his bankers for presentation. Meantime P. learned his loss, wrote to plaintiffs about it, and asked for another check, which was sent him. Afterwards the first check was presented to M. & Co. by the L. and J. Bank, and was paid in spite of the crossing on its face. Subsequently the second check was presented to M. & Co., and paid. The jury found everybody concerned, except the defendant, had been guilty of negligence in the matter. *Held*, that the action could be maintained, as the defendant acquired no title to the check, and M. & Co.

paid the first check without authority.—*Bobbett* v. *Pinkett*, 1 Ex. D. 368.

Bond by Shipmaster.—*See* Collision, 2.

Broker.

H. & Co., fruit-brokers, gave the plaintiff a sold-note as follows: "We have this day sold to you, on account of James Morand & Co., 2000 cases oranges," which they signed with their own name merely. In an action against the brokers for non-performance, *held*, that they intended to bind their principals, and that they were not liable as principals themselves.—*Gadd* v. *Houghton*, 1 Ex D. 357.

See Principal and Agent, 2.

Carrier.—*See* Common Carrier.

Charterparty.—*See* Freight.

Check.—*See* Bills and Notes, 1, 2, 3.

Class.

1. A testator left an aggregate fund to trustees to pay the income to his wife, and on her death to apply the income to the support of "such child or children of mine then living, and of the issue of my child or children then deceased, . . . until my youngest surviving child shall have attained the age of twenty-one years." At that time, the trustees were to make certain sales of real estate, and to stand possessed of the whole fund in trust for "my child or children then living, and the issue then living of my child or children dying before that period," the shares of the children to be paid immediately, the shares of the other issue at marriage or the age of twenty-one. The youngest child became twenty-one in 1862. The widow died in 1874, and several of the children had died before her. *Held*, that the class to take was to be ascertained at the widow's death, and the personal representatives of a child dying before that time took nothing.—*In re Deighton's Settled Estates*, 2 Ch. D. 783.

2. A testator gave the residue of his estate to trustees in trust to pay the income to R. M. for his life, and at his death to pay the trust fund to his sister's female children "on their attaining the age of twenty-one years, or marrying with the consent of their parents," R. M. died in 1870, at which time the testator's sister was a widow with two daughters. In 1875, one daughter married with her mother's consent, and she and her husband petitioned for the transfer of a half of the residue of testator's estate. *Held*, that the "consent of parents" must mean, parents or parent, if any," so that when the daughter married with her mother's consent she took a vested interest, and the class to take was to be fixed when an individual of it became absolutely entitled.—*Dawson* v. *Oliver-Massey*, 2 Ch. D. 783.

Cloak-Room Ticket.—*See* Bailment, 1, 2.

Collateral Covenant,—*See* Covenant.

Collision.

1. An Inman steamer, going at ten and a half knots an hour, on a dark night, between Queenstown and Liverpool, overtook and ran down a bark having no light astern. The bark saw the steamer a quarter of an hour before the collision, but had not time enough to run up a light before they struck. The steamer did not see the bark. *Held*, that the steamer was liable, and that there was no contributory negligence on the part of the bark.—*The City of Brooklyn*, 1 P. D. 276.

2. A steamer, bound to port for a perishable cargo of fruit, negligently ran into a sailing-vessel; and the master of the steamer, to avoid detention, and in good faith, gave a bond binding himself and his owners to pay the damage done. In an action against the vessel by the captain for wages and disbursements, including the amount of the penalty of the bond, *held* that the amount of the penalty must be held in court to abide the result of any claim preferred against the captain in respect of the bond.—*The Limerick*, 1 P. D. 292.

Common Carrier.

The plaintiff shipped two horses on a steamer belonging to defendant, for transportation. There was no bill of lading. In a storm of more than usual violence, partly from the rolling of the ship in the heavy sea, and partly from struggling from fright, one of the horses was so injured that she died. The jury expressly found that there was no want of due care on the part of the defendant, either in taking proper measures beforehand for guarding against storms, or in the treatment of the horse at the time of the storm and afterwards. *Held*, that the defendant was not liable. "Act of God" defined by Cockburn, C.J.—*Nugent* v. *Smith*, 1 C. P. D. 423; s. c. 1 C. P. D. 19; 10 Am. Law Rev.

Concealment.—*See* Marine Insurance, 1.

Condition on Ticket.—*See* Bailment, 1, 2.

Consideration.—*See* Principal and Agent.

Conspiracy.—*See* Frivolous Suit.

Constructive Total Loss.—*See* Marine Insurance, 2.

Contingent Interest.—*See* Marriage Settlement.

Contract.

1. The defendants bought rice of the plaintiffs, to be shipped at Madras "during the months of March and or April, 1874, about 600 tons, per *Rajah*, of Cochin." The 600 tons filled 8,200 bags; of which 1,780 bags were shipped Feb. 23, 1,780 bags Feb. 24, 3,560 bags Feb. 28, and the remaining 1,080 bags on Feb. 28, with the exception of 50 bags, which were shipped March 3, on which day the bill of lading for the last 1,080 bags was signed. The defendants refused to accept the rice upon its arrival. Evidence was given that rice shipped in February would be the spring crop, and equally good with rice shipped in March or April. *Held*, that the defendants were not bound to accept the rice.—*Shand* v. *Bowes*, 1 Q. B. D. 470.

2. The plaintiff contracted with the defendants to construct some dockworks. There

was in the contract provision for a penalty of £100 a week in case the works were not completed on or before on or or before Aug. 31, 1873. The works were not completed on that date, and on Jan. 22, 1874, the defendants gave notice to the plaintiff to terminate the contract; and they at the same time seized the the materials and implements of the plaintiff, under the following clause in the contract: "Should the contractor fail to proceed in the execution of the works in the manner and at the rate of progress required by the engineer, or to maintain the said works to the satisfaction of the engineer, his contract shall, at the option of the company, be considered void, as far as relates to the works remaining to be done; and all sums of money due the contractors, together with all materials and implements in his possession and all sums named as penalties for non-fulment of the contract, shall be forfeited to the company, and the amount shall be considered as ascertained damages for breach of contract." There was a clause providing that if the works were not completed "within the period limited for that purpose," it should be lawful for the company to assume control of and finish them, in which case the contractor should be paid only for the work he had done. *Held*, that the forfeiture of the sums of money, materials, and implements, as set forth in the above clause, could only be enforced before the expiration of the time limited for the completion of the contract.—*Walker* v. *The London & North-western Railway Co.*, 1 C. P. D. 518.

See Principal and Agent, 1.

Contract to Sell.—*See* Vendor's Lien.

Contributory Negligence.—*See* Collision, 1.

Covenant.

Covenant by a lessee to keep only such a number of hares and rabbits as should not injure the crops, &c.; and in case he kept a greater number, he should pay a fair compensation for the damage, to be fixed, in case of disagreement, by two arbitrators. In an action for breach of the covenant to keep only such a number, *held* that the action could be maintained before an arbitration, the clause as to arbitration being a distinct and collateral covenant.—*Dawson et al.* v. *Lord Fitzgerald*, 1 Ex. D. 257.

Creditor with Notice.—*See* Joint Debtor.

Damage to Cargo.—*See* Bill of Lading.

Damages, Measure of.—*See* Measure of Damages.

Deaf Mute.

A deaf mute was found guilty of felony, but the jury also found that the prisoner was not capable of understanding, and did not understand, the proceedings against him. *Held*, that the prisoner could not be convicted; and it was ordered that he be detained as of insane mind during the Queen's pleasure.—*The Queen* v. *Berry*, 1 Q. B. D. 447.

Debt of Honor.—*See* Infant.

Delivery of Cargo.—*See* Bill of Lading.

Discovery.—*See* Production of Documents.

Distribution.—*See* Trust to Sell.

Documents, Inspection of.—*See* Inspection of Documents.

Estoppel.

A company, formed to build a railway, improperly went on when only one-fifth of the capital stock was taken. In a bill filed by a shareholder to avoid his contract to take shares, it appeared that, for a long time after the company was to his knowledge proceeding illegally, he continued to act with the other members of it, and did not protest against the improper and illegal acts. *Held*, that, though he might have originally had a ground of relief, he had lost it by acquiescence.—*Sharpley* v. *Louth & East Coast Railway Co.*, 2 Ch. D. 663.

See Bills and Notes, 2; Vendor's Lien.

Equitable Owner.—*See* Insurance.

Evidence.—*See* Bills and Notes, 2.

Forcible Entry.

L. was mortgagee in fee of premises, but did not take actual possession. T. and W. occupied the premises under the mortgagor who had never been dispossessed. L. one day had a carpenter take off the lock of one of the doors, and he entered into possession. T. and W. entered by a window and expelled L. L. had them indicted for forcible entry. They were acquitted, and sued L. for malicious prosecution without reasonable and probable cause. *Held*, that the action could not be maintained. If L. got the legal possession for civil purposes, that was ground enough for an indictment against T. and W. for forcible entry.—*Lows* v. *Telford et al.*, 1 App. Cas. 414.

Foreign Judgment.—*See* Marine Insurance, 2.

Forfeiture.—*See* Contract, 2.

Forged Indorsement.—*See* Bills and Notes 2, 3.

Frauds, Statute of.—*See* Statute of Frauds.

Freight.

Charterparty by the defendants to convey a cargo of railway iron from England to Taganrog, Sea of Azof, "or so near thereto as the ship could safely get," consigned to a Russian railway company. The ship arrived Dec. 17, at Kertch, a port thirty miles from Taganrog, where the captain, the plaintiff, found the sea so blocked up with ice, and unnavigable till April. Against the orders of the charterers, who notified him that they would hold him responsible, he proceeded to unload the cargo; and there being nobody to receive it, he put it in charge of the custom-house authorities there. The consignees claimed it; and, on their producing the bills of lading and charterparty, it was delivered to them against the captain's claim that it should be retained for freight. A receipt was given to the effect that the cargo was received

"on the power of the charterparty and the bill of lading." *Held*, by Mellor and Quain, J.J., that the captain was entitled to no freight; by Cockburn, C. J., that he ought to have freight *pro rata.—Metcalfe* v. *The Britannia Ironworks Co.*, 1 Q. B. D. 613.

Frivolous Suit.

The court will stay summarily as frivolous and vexatious an action brought for conspiring to make, and making, false statements about the plaintiff, if the defendants come in and show that they did all that they did as members of a military court of inquiry, and in the performance of their official duty.—*Dawkins* v. *Prince Edward of Saxe Weimar. Same* v. *Wynyard. Same* v. *Stephenson*, 1 Q. B. D. 499.

Fund in Court.—*See* Marriage Settlement.

Good-Will.—*See* Mortgagor and Mortgagee.

Indorsment of Check.—*See* Bills and Notes, 1, 2, 3.

Infant.

B., being of full age, promised to pay, "as a debt of honor," a debt contracted when under age. Such a promise is not a "ratification of the contract made during infancy," as a "debt of honor" cannot be enforced at law.—*Maccord* v. *Osborne*, 1 C. P. D. 569.

Inspection of Documents.

Letters written and sent for the confidential and private information of the solicitor of a party in a future suit, and having reference to the subject-matter thereof, are not privileged. But if they are written in reply to the application of such solicitor, with a view to using the information so obtained in the suit, the case is otherwise.—*M'Corquodale* v. *Bell*, 1 C. P. D. 471.

Insufficient Assets.—*See* Residuary Legatee.

Insurance.

D. became owner of a vessel in December, 1868, and the plaintiff equitable mortgagee. D. applied for insurance on the vessel in the defendant company in January, 1860, ordering the policy made in plaintiff's name, and sent to him. The policy, in the usual form, was made in the name of D., but sent to plaintiff. D. did not inform the defendant company that the plaintiff was equitable mortgagee. In the policy, *inter alia*, was this: "This is to certify that Mr. D., as ship's-husband for the H., whereof is master at the present time D., has this day paid £17 10s for insurance . . . on said vessel." In January, 1870, while the vessel was on a voyage, plaintiff took out a policy like the preceding, but in his own name as ship's-husband. In March, 1870, plaintiff, on application of the defendant company, paid the yearly assessment for losses, and received a receipt therefor as husband of the said vessel. In October, 1870, he paid another. In May, 1870, D. transferred the vessel to the plaintiff, who became registered owner. The defendant company had no notice of this. Later, D. put in a claim for the loss of an anchor. In November, 1870, the vessel was lost, and in December plaintiff put in a claim for the insurance. In January, on request of the company, D. attended a meeting of the directors to consider the claim. After his withdrawal they resolved that there was no claim. In April, 1871, another meeting was held, which came to a similar resolution; but D. was not notified, and the plaintiff had no notice of either meeting. Neither D. nor the plaintiff had signed, or been asked to sign the articles. The company was a limited mutual insurance company. Every person insuring a ship in the company was a member, provided he signed the articles. The directors were to manage the affairs of, and act fully for, the company, with full power to settle disputes between members and the company; and no member could bring suit against the company, except as thus provided. If any member sold his ship, the new owner was to have no claim upon the company for loss. In case of loss, the directors were to summon the owner, master, or crew, as they saw fit, and make inquiry as to the loss. *Held*, reversing decision of the Queen's Bench, that the plaintiff could recover. (Archibald, J., and Pollock, B., dissenting.) *Edwards* v. *The Aberayron Mutual Ship Insurance Society*, 1 Q. B. D. 563.

Joint Debtor.

The defendants, R. and H., who were partners, had been in the habit of consigning goods through the plaintiffs to B. and S. for sale, the proceeds to be remitted by B. and S. to the plaintiffs. By an agreement writing between plaintiffs and R. and H. these remittances were to be held to pay an advances made by plaintiffs on account of R. and H.; and the balance was to be sent to R. and H. The practice was for the defendants to draw on the plaintiffs, who accepted the drafts; and the defendants discounted their acceptances. In case the goods were not sold in season for the acceptances to be met, the defendants made a new draft, which the plaintiffs accepted. Thus the plaintiffs got new funds to meet the old acceptances, and the defendants got further time. This course continued for five years, at the end of which time R. and H. dissolved partnership. At that time there was goods in the hands of B. and S. for sale, and the plaintiffs had, on the security of them, accepted R. and H.'s drafts. H. went on with the business, and drew new drafts in the same manner, in the name of "R. and H., in liquidation." A year after the dissolution, H. informed plaintiffs that R. had withdrawn, and that he (H.) would go on with the business. Plaintiffs afterwards accepted R.'s drafts in the manner above described, by the discount of which they were saved cash advanced. The action was brought partly for advances which had been renewed by "R. and H., in liquidation," partly for advances which had been renewed by H.'s draft alone, accepted by plaintiffs. *Held*, that the plaintiffs had a right to treat both R. and H. as principal debtors, and that R. was

not discharged by the extension of time given H. in pursuance of the practice of the parties. —*Swire et al.* v. *Redman & Holt*, 1 Q. B. D. 536.

Laches.—*See* Estoppel.

Lease.

The *habendum* of a lease stated the term as 94¼ years, the *reddendum*, as 91¼. The counterpart of the lease signed by the lessee had 91¼ in both parts. *Held*, that the *habendum* must control the *reddendum* in the lease itself, and that the counterpart must be made to follow the lease, and that the term was therefore 94¼ years.—*Burchell* v. *Clark*, 1 C. P. D. 602.

Liability of Master.—*See* Collision, 2.

Liability of Ship-Owner—*See* Bill of Lading.

Lien.—*See* Vendor's Lien.

Life Insurance.—*See* Amalgamation of Companies.

Limitations, Statute of.—*See* Statute of Limitations.

Malicious Prosecution.

The declaration set forth that defendants falsely and maliciously wrote and published a certain notice, requiring the plaintiff, under the Insolvent Act of Canada, to make an assignment of his property for the benefit of his creditors, as certain promissory notes on which the plaintiff was liable to the defendants and others had long been overdue, and were unpaid. In another count, it was complained that the defendants maliciously, and without probable cause, had the plaintiff arrested, in a suit on certain promissory notes indorsed to the defendants by the plaintiff, on the ground that he was about to leave the country; when the court subsequently found that he was not about to leave the country, and ordered his discharge. The defendants replied to the first count, that the notice in question was true, and was not published, except to the plaintiff. To the last count they replied simply, that the note was long due, and that they had been informed, and believed, the plaintiff intended to leave. The court ruled, that, unless the defendants believed that they would lose their debt unless they had the defendant arrested, or if they acted with the idea of protecting other indorsers who might otherwise be liable to them, there would be evidence of want of reasonable cause for the arrest sufficient to justify damages. *Held*, error in the charge, and that the said notice was a legal proceeding, and *prima facie* privileged. —*Bank of British North America* v. *Strong*, 1 App. Cas. 307.

See Forcible Entry.

Marine Insurance.

1. The brig *Jessie*, from Falmouth, arrived at Mazagan, in Morocco, Dec. 27, 1874. Jan. 1, 1875, she was driven from her moorings in a gale, and lost her anchor. On the 9th, the captain wrote the plaintiff, who was owner, but said nothing about the loss of the anchor. The letter reached the plaintiff on the 24th, and, just a month later, the plaintiff, having had no further news of the vessel, had her insured in the defendant company, "lost or not lost." He said to the company's, "I do not know when she was ready to sail; I have not had the sailing letter yet." The usual time for loading at Mazagan was fifteen to twenty days, and for the voyage home, twenty-five to thirty, and the course of the post was irregular. After verdict for plaintiff, a motion to enter verdict for defendants, on the ground that the failure by the captain to mention the loss of the anchor constituted a material concealment, was refused. *Quære*, if a failure to communicate such a fact forms a defence, unless fraudulent.—*Stribley* v. *Imperial Marine Ins. Co.*, 1 Q. B. D. 507.

Marriage Settlement.

Where a husband, by a post-nuptial settlement, made a covenant to settle on his wife any property to which she was, or during the marriage should become, entitled, it was *held* that a fund in court, then contingent, and which came into possession after her death, was included.—*Agar* v. *George*, 2 Ch. D. 706.

Marshalling Assets.

Testator made several pecuniary legacies, and devised a specific real estate to one son, and the residuary real estate to another There was not enough personalty to pay the debts besides the legacies. *Held*, that the pecuniary legacies must be exhausted in making up the deficiency before resorting to the real estate.—*Farquharson* v. *Floyer*, 3 Ch. D. 109.

Master and Servant.

1. The defendants employed the plaintiff with other workmen, and also a steam-engine, with an engineer, in sinking a shaft in their colliery. When the work was partly done they employed W., under a verbal contract, to finish it. W. was to employ and pay the plaintiff and the other workmen. The engine and engineer were under his control, but the engineer's wages were to be paid by the defendants. The plaintiff was injured through the negligence of the engineer. *Held*, that the defendants were not liable.—*Rourke* v. *The White Moss Colliery Co.*, 1 C. P. D. 556.

2. The S. Club, composed of persons interested in agriculture, made an agreement with the defendant company for the use of the company's hall for their annual shows. By this agreement the hall was, during the times of the shows, at the entire disposal of the club. The company was to provide accommodation for the stock and things exhibited, and provide and pay a sufficient body of men to do all the work about the show, and who should be under the exclusive control of the club. The company was to pay £1,000 to the club at each show, and be at liberty to charge and receive an admission fee of 1*s*. The club was to have entire and exclusive control of the show while it was in progress. The club contracted with one S. to see to admitting the stock, &c., at the gate, to its dis-

position, and to its delivery. He admitted and delivered on orders signed by the club, and was paid in the lump for the whole job. Plaintiff bought some sheep of an exhibitor at the show, and got an order to S. for their delivery. S. delivered him other sheep in place of his own. *Held*, that the defendant company was not liable.—*Goslin* v. *The Agricultural Hall Co.*, 1 C. P. D. 483.

3. Contract in writing, as follows: "I hereby accept the command of the ship C. C., on the following terms: Salary to be at and after the rate of £180 per annum." "Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the demand; and the owners have the option of paying or not paying his expenses travelling home." "Wages to begin when captain joins ship." The captain was dismissed, not for misconduct, but without notice. *Held*, that the captain was entitled to reasonable notice under this contract.—*Green* v. *Wright*, 1 C. P. D. 591.

Measure of Damages.

The plaintiff, who was contractor for the construction of a tramway with a tramway company, contracted with defendants that they should lay with asphalt and maintain in good order for twelve months the said tramway. Within the twelve months, one H., driving over the road, was thrown out and hurt, in consequence of the defective condition of the asphalt. H. sued the tramway company, who gave notice to the plaintiff. Plaintiff gave notice to the defendants. They refused to settle; and plaintiff, by negotiation, finally settled by paying £110: £70 damages, and £40 H.'s costs. He sued for these sums, together with £18 costs of his own in getting the claim reduced. *Held*, that the defendants were only liable for the £70 damages.—*Fisher* v. *The Val de Travers Asphalte Co.*, 1 C. P. D. 511.

Mistake.

G. P. R., an undischarged bankrupt, ordered goods from a firm under his old firm name of J. R. & Co., Mincing Lane, Plymouth." The firm sent them, thinking the order was from "R. Bros. & Co., Old town St. Plymouth," with whom they had had dealings. G. P. R.'s trustee in bankruptcy seized and claimed the goods, and the sellers, learning the mistake, sued to recover them. *Held*, that no property in them had passed, and the trustee must restore them.—*In re Reed. Ex parte Barnett*, 3 Ch. D. 123.

Mortgagor and Mortgagee.

P., lessee of certain dock premises, and the machinery movable and immovable thereon, for twenty-one years mortgaged the same to L. & Co. Afterwards a railway company gave notice to P. to buy the premises for the railway under the Land Clauses Act. P. died; and L. & Co., took possession, and gave notice to the railway company that they wished the compensation settled by arbitration. The company, and the executors and the mortgagees, concurred in the appointment of an umpire; and he made an award of a certain sum, including £2,800 "in respect of trade profits which would have accrued if the premises had not been taken" by the railway company. The executors claimed this sum. *Held*, that it belonged to the mortgagees. *Pile* v. *Pile. Ex Parte Lambton*, 3 Ch. D. 36.

Mutual Insurance.—*See* Insurance.

Negligence.—*See* Bills and Notes, 2, 3.

Negligence of Fellow-Servant.—*See* Master and Servant, 1.

Notice.—*See* Master and Servant, 3.

Partnership.—*See* Joint Debtor.

Patent.

Three referees were appointed under an act of Parliament to inquire into the impurities of the London gas, with right to require the gas companies to afford them facilities for their investigations. As a result of their examinations, one of the number thought he had discovered a method of securing greater purity in the gas. The impurities complained of came from certain compounds of sulphur. The defendant company had experimented on the matter, and had been using lime in the purifiers. This, with the contents of the purifiers, formed sulphide of calcium, with which the sulphur impurities combined. The carbonic acid of the gas impeded the action of the sulphide of calcium, and the result was, the gas came out to impure for use, and could not always be relied on to come out with the same degree of purity. The gist of the plaintiff's change consisted in keeping more lime in the first set of purifiers. In this way the carbonic acid was more effectually removed, and the subsequent processes of removing the sulphur impurities by sulphide of lime were much more effective. The change was suggested to the defendant company by the referees, and the latter tried it, with success. The referees made their report, incorporating these suggestions and experiments; but the report was witheld from publication, to enable the plaintiff to get out a patent. *Held*, that the plaintiff's idea only amounted to a more thorough application of something in use before. *Quære*, whether a public official can patent the results of an official investigation. *Patterson* v. *Gaslight & Coke Co.*, 2 Ch. D. 812.

Petition of Right.

English merchants were authorized by the law of China to trade only with members of a guild called the Cohong. War broke out between England and China, the Cohong was abolished, and the English merchants lost their only remedy, which was against the Cohong. A treaty was made between the countries, under which China paid to the British government a certain sum on account of debts due from former members of the Cohong to said merchants. It was *held* that a petition of right would not lie by one of said British merchants to obtain payment of a sum of money alleged to be due from a former member of the Cohong.—*Rustomjee* v. *The Queen*, 1 Q. B. D. 487.

Power to Sell.—*See* Trust to Sell.

Principal and Agent.

1. Action for breach of the following undertaking: "I undertake to load the ship *Der Versuch*, twenty-nine keels, with Bebside coals, in ten colliery working days. On account of Bebside Colliery, W .S. Hoggett." Hoggett the defendant, was a clerk of the colliery company, which had made a contract with B., W., & Co., to furnish them a certain amount of coal in the months of January, February, and March, "the turn to be mutually agreed upon." B., W., & Co., chartered the plaintiff's ship to convey the coal; and the plaintiff, objecting to the provision of the charterparty as to the matter of detention in loading "in turn, the above undertaking was procurred, and the charter was completed. The undertaking purported to be with nobody in particular. The vessel was detained beyond ten days, and the claim was for demurrage. *Held*, that the jury properly found that the defendant was personally bound, though he did not know he was making the undertaking in reference to a pending charter, and that there was consideration therefor. *Weidner* v. *Hoggett*, 1 C. P. D. 533.

2. A broker is not personally liable on a note signed by him, and running thus: "I have this day sold by your order and for your account, to my principals, five tons anthracene." *Southwell* v. *Bowditch*, 1 C. P. D. 374 s. c. 1. C. P. D. 100; 10 Am. Law Rev.

See Bills and Notes, 1; Broker.

Privileged Communication.—*See* Inspection of Documents; Production of Documents.

Privity.—*See* Master and Servant, 2.

Production of Documents.

A banking company, having a controversy about an alleged fraudulent transfer of an account, at one of its branch offices, telegraphed to the manager of the branch office to write full particulars. In the suit that followed, the bank refused to produce the letter sent in answer to the telegram, claiming it to be privileged. *Held*, that it must be produced. *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644.

Proximate Result.—*See* Measure of Damages.

Public Official.—*See* Patent.

Ratification of Contract.—*See* Infant.

Realty and Personaly.—*See* Marshalling Assets.

Residuary Legatee.

A testratrix gave life annuities, and ordered funds invested to pay them. She then gave the residue of her estate, "including the fund set apart to answer the said annuities, . . when and so soon as such annuities shall respectively cease," to J. The estate paid only 5*s.* in the pound, and the court ordered sums apportioned to each annuity to be invested and the income duly paid. One of the annuitants died, and J. claimed the fund out of which this annuitant had received his annuity. *Held*, that all the annuities must be paid in full before J. could take anything as residuary legatee.—*In re Tootal's Estate. Hankin* v. *Kilburn*, 2 Ch. D. 628.

Right, Petition of.—*See* Petition of Right.

Sale.—*See* Vendor's Lien.

Salvage.

The steamer M., from Sumatra to Jedda, with 550 pilgrims, was wrecked on the Parkin Rock, in the Red Sea, two or three days' voyage from Jedda. The steamer T. came up, and her captain refused to rescue and carry to Jedda the pilgrims for less than £4,000, the whole amount of the passage money from Summatra, to Jedda. The captain of the M. at last agreed to give this amount. *Held*, that the bargain was inequitable, and must be set aside. £1,800 was awarded. *Tye Medina*, 1 P. D. 272.

Sheriff.

A sheriff seized goods under *fi. fa.*, and the execution creditor afterwards lost his claim under the execution by accepting a composition from the execution debtor. He gave no instructions to the sheriff how to proceed, and the sheriff sold the goods for his fees and expenses. *Held*, that the execution debtor could maintain trover or trespass against the sheriff in respect of the goods so sold.—*Sneary* v. *Abdy*, 1 Ex. D. 299.

Slander.

In an action to impeach a testators's signature to a will which the plaintiff was an attesting witness, the defendant testified as an expert that he thought the signature was forged. The jury found in favor of the will and the presiding judge animadverted severely upon the hardihood of the expert. These strictures were published next day in the *Times*. Afterwards defendant was called in an action for forgery, and testified that the alleged forgeries were genuine signatures. The counsel, in cross-examination, referred to the witness' testimony in the previous case, the remarks of the judge, and the item in the *Times*, and sat down. Thereupon the witness began an "explanation" of the previous case, and, in spite of the efforts of the judge to stop him, said: "I believe that will to be a rank forgery, and I shall believe so to the day of my death." The jury found, on special questions put them by the judge, that the witness spoke these words not in good faith as a witness, nor in answer to any question, but for his own purposes, and maliciously. *Held*, that the words were privileged.—*Seaman* v. *Netherclift*, 1 C. P. D. 540.

Sold Note.—*See* Broker.

Statute.

A man may be convicted and fined for "riding a horse furiously so as to endanger the lives of passengers," under the following statute: "If any person, *riding* any horse or beast, or *driving* any sort of carriage, shall *ride* or *drive* the same furiously so as to en-

danger the life of any passenger, every person so offending and being convicted of such offence shall forfeit a sum not exceeding £10 in case such *driver* shall not be the owner of such wagon, cart, or other carriage, and in case the offender be the owner of such wagon, cart, or other carriage, then any sum not exceeding £10."—*Williams* v. *Evans*, 1 Ex. D. 277.

Statute of Frauds.

The following note by W.'s solicitor to A.'s solicitor is not such as to meet the requirements of the Statute of Frauds, although a verbal agreement was made, as there stated: "W. has been with us to-day, and stated that he had arranged with your client A. for the sale to the latter of the Lion Inn for £950. We therefor send herewith draft contract for your persual and approval.—*Smith* v. *Webster*, 3 Ch. D. 49.

Statute of Limitations.

A writ was issued in the Common Pleas for a claim not then barred, but it was never served. After the claim was barred, but within six months of the date of the writ, the time allowed by the Procedure Act for the writ to remain in force, a bill in Chancery was brought for the same claim. *Held*, that the writ would have saved the claim in the Common Pleas, but was of no effect against the statute in proceedings in equity.—*Manby* v. *Manby*, 3 Ch. D. 101.

Sub-contractor.—*See* Master and Servant, 2.

Tenant in Tail.

G. R. had an estate tail expectant on the death without issue of C. R., a lunatic. C. R. died without issue, and G. R. had converted his estate tail into a base fee, and died leaving a widow and children. The land was sold and the fund paid into court. G. R.'s widow and children petitioned to have the fund paid out to them. *Held*, that they must first produce a proper deed enlarging the base fee. *In re Reynolds*, 3 Ch. D. 61.

Ticket.—*See* Bailment, 1, 2.

Time for Completion of Contract.—*See* Contract, 2.

Transfer of Shares.—*See* Contributory, 1, 2.

Trust to Sell.

A testator left his property, including a newspaper, to his son W., and two others, trustees in trust, among other things, "to carry on, or cause to be carried on, under their inspection and control, during the life of my said wife," the newspaper. He directed a reserve fund of one-fourth part of the profits of the newspaper to be set apart each year to aid in carrying it on, and then directed the trustees to divide the remaining three-fourths of the profits of the paper, and his other property, into six parts, and to pay one part to each of his five children named, and one to his wife; and in case a child died without issue before the death of his wife, his share to go to the surviving children. Then followed: "In case any of my children shall survive my wife, and die before he shall have received his share of my trust estate without leaving issue, I give such share equally amongst my surviving children." Then came this: "And from and after the decease of my wife (or during her life if she and the majority of my children and my trustees shall think it proper and expedient so to do), at the sole discretion of my trustees, or trustee, to sell and absolutely dispose of all my real and personal estates, and my trade or profession [the newspaper], and the good-will thereof, and to divide the proceeds thereof amongst my wife and children and their issue, if the division be made in the lifetime of my wife, but if the division be made after her death, amongst my children and their issue." Then followed a provision, that, in case it was decided to sell the paper under the foregoing provisions, the eldest son should have the privilege of taking it at £500 under the market value. *Held*, that the will created an absolute trust to sell at the death of the wife, and a trust to sell in the discretion of the trustees as to the time and manner thereof, during her life; and at the wife's death to the surviving children took equal vested shares in the newspaper and the residue of the property.—*Minors* v. *Battison*, 1 App. Cas. 428.

Ultra Vires.—*See* Debentures.

Vendor's Lien.

Dec. 31, 1873, the defendants sold to B. & Co., one hundred tons zinc, out of a gross lot lying on the wharf, and at the same time made two "undertakings," as follows: "We hereby undertake to deliver your order indorsed hereon twenty-five tons zinc off your contract of this date." Jan. 7, 1874, the plaintiffs bought of B. & Co., fifty tons zinc, and paid for it. Jan. 14, B. & Co., failed, having given the defendants a bill for the zinc, which was dishonored; and the defendants refused to deliver the zinc to the plaintiffs. *Held*, that the assumed undertaking to deliver did not estop the defendants from setting up against the plaintiffs their right as unpaid vendors to stop the goods.—*Farmeloe* v. *Bain*, 1 C. P. D. 445.

Vested Interest.—*See* Class, 1; Trust to Sell.

Wages and Disbursements.—*See* Collision, 2.

Waiver.

In bankruptcy proceedings against the holder of a lease, the lessors sent the trustee in bankruptcy a notice to disclaim the lease within twenty-eight days, as the Bankruptcy Act provided. Some letters followed; and the day before the twenty-eight days were up the lessors wrote, "We should be glad to have a reply to our letter of the 24th ult., as to whether you intend to retain the lease, at your earliest convenience." The letter of the 24th ult., contained the notice to disclaim. *Held*, that the right to a disclaimer within the twenty-eight days was waived by the

lessors.—*Ex parte Moore. In re Stokoe*, 2, Ch. D. 802.

Warehouseman.—*See* Bailment, 1, 2.

Will.—*See* Class, 1, 2; Residuary Legatee; Trust to Sell.

Witness.—*See* Slander.

Words.

"*Act of God.*"—*See* Common Carrier.

"*For your Account.*—*See* Principal and Agent, 2.

"*On Account of.*"—*See* Broker.

"*Receiver*," "*Divide.*—*See* Trust to Sell.

"*Rider*," "*Driver.*"—*See* Statute.

SPRING ASSIZES.

EASTERN—HARRISON, C. J.

Ottawa	Tuesday	March 20th.
Pembroke	Tuesday	April 3rd.
Certh	Tuesday	April 10th.
Lornwall	Tuesday	April 17th.
L'Orignal	Tuesday	April 24th.

MIDLAND—GWYNNE, J.

Belleville	Tuesday	March 13th.
Napanee	Thursday	March 22nd.
Brockville	Tuesday	April 3rd.
Kingston	Tuesday	April 17th.
Picton	Tuesday	May 1st.

VICTORIA—PATTERSON, J,

Brampton	Monday	March 26th.
Whitby	Tuesday	April 3rd.
Cobourg	Monday	April 9th.
Lindsay	Tuesday	April 24th.
Peterborough	Tuesday	May 1st.

BROCK—GALT, J.

Owen Sound	Tuesday	March 20th.
Walkerton	Tuesday	April 3rd.
Goderich	Thursday	April 12th.
Stratford	Tuesday	April 24th.
Woodstock	Thursday	May 3rd.

NIAGARA—MORRISON, J.

Hamilton	Monday	March 19th.
Milton	Monday	April 16th.
St. Catharines	Monday	April 23rd.
Welland	Tuesday	May 1st.
Cayuga	Tuesday	May 8th.

WATERLOO—WILSON, J.

Simcoe	Tuesday	March 13th.
Berlin	Monday	March 19th.
Brantford	Monday	March 26th.
Guelph	Monday	April 9th.
Barrie	Monday	April 23rd.

WESTERN—BURTON, J.

London	Monday	March 26th.
Sandwich	Tuesday	April 10th.
St. Thomas	Tuesday	April 17th.
Sarnia	Tuesday	April 24th.
Chatham	Tuesday	May 1st.

HOME—MOSS, J.

Toronto, (Oyer, Terminer, and General Gaol Delivery)	Tuesday	March 27th.
Toronto, (Assize and Nisi Prius)		April 10th.

There will be a jury and non-jury list in Toronto, Hamilton, and London. The former will be first disposed of.

The Chief Justice of the Common Pleas will remain in Toronto during circuit to hold the sittings of the Single Court and Judges' Chambers each week.

FLOTSAM AND JETSAM.

Prolix Judgments.—The number and voluminousness of the judgments delivered by the judges in the case of the *Franconia*, have placed the Law Reporting Society in some difficulty. The point to which they refer is so important that they ought to be all put on record, but they would occupy nearly a volume themselves. The judgment of the Lord Chief Justice alone occupied three hours in delivery. It is estimated that the cost of printing them to the Society would be £850, and the reporters naturally hesitate to incur such an expense. It is probable, I believe, that the matter will be compounded by the printing of two of the judgments on each side of the question.

Legal Notes and Queries.—In one of the legal journals there appears a column headed "Notes and Queries on points of Practice;" beneath the heading is a note to the following effect—"This column is not open to questions involving points of law such as a solicitor should be consulted upon. Such questions are excluded." This is a restriction, the property of which is tolerably obvious. It could not be for the benefit either of barristers, solicitors, or, in the long run, of the public, to establish a system of anonymous question and answer through the medium of the public press. Were such a practice once tolerated it might become the fashion to submit regular cases in the shape of "queries," and receive the opinions thereupon, at the very moderate cost involved in buying a copy of the paper in which the correspondence appears. Such a plan might save some intending suitors a good deal of money in the shape of fees, but the gratuitious opinions thus delivered by irresponsible persons would hardly prove as satisfactoy at the price as the more expensive

ing her consent to be barred of her dower, and notwithstanding any irregularity, informality, or defect in the certificate (if any), and notwithstanding that such deed or conveyance may not have been executed, acknowledged or certified, as required by any Act now or heretofore in force, respecting the barring of dower.

Contingent interests, &c.—Liability in execution.

37. Section eight of the Act passed in the twenty-fourth year of Her Majesty's reign, and chaptered forty-one, is hereby revived and amended by adding after the word "party" in the seventh line the words, "or over which such party has any disposing power which he may, without the assent of any other person, exercise for his own benefit."

Partition of real estate.

38. In any suit in the Court of Chancery for partition or sale, where any of the persons interested in the lands whereof partition or sale is sought are unknown to the plaintiff, or have not been heard of for three years or upwards, the Court shall have the same jurisdiction, that, in proceedings under the Act passed in the thirty-second year of Her Majesty's reign, and chaptered thirty-three, and the amendments thereto, it possesses for the purpose of binding the interests of such persons and dealing with the estate of such of them as by reason of long continued absence may reasonably be believed to be dead; and the like proceedings may be taken in such suit for the said purpose as might be taken upon a petition under the said Acts, and every deed or vesting order made in any such suit shall have the same effect as a deed or vesting order made in proceedings under the said Act.

Contingent remainders.

39. Section six of chapter ninety of the Consolidated Statutes for Upper Canada, is hereby amended by striking out the word "A" in the first line thereof and substituting the following:

"Every contingent remainder at present existing or hereafter created shall be, and every"

Registration of Orders in Council.

40. [Orders in Council may be registered].

Jurisdiction of Police Magistrates, &c.

41. [Police Magistrate and Stipendiary Magistrate may sit alone].

AN ACT RESPECTING THE COUNTY COURT AND GENERAL SESSIONS OF THE PEACE AND SURROGATE COURT OF THE COUNTY OF YORK.

Her Majesty, &c., enacts as follows:

1. The sittings of the County Court of the County of York, for the trial of issues of fact and assessment of damages, and the sittings of the Court of General Sessions of the Peace for the said County, shall hereafter commence respectively on the first Tuesday in the months of December and March, and on the second Tuesday in the months of May and September, in each year.

2. While sittings of the County Court of the County of York are being held for the trial of issues of fact and assessment of damages, the Judges of the said court, or any two persons authorized to hold the sittings of such court, may, in case the General Sessions of the Peace have been adjourned or have terminated, sit separately and concurrently, one for the trial of causes where a jury is required, and the other for the trial of causes to be tried without a jury.

3. The Terms of the County and Surrogate Courts of the County of York shall hereafter commence respectively on the first Monday in January and April, and on the second Monday in June and October, in each year, and shall end on the Saturday of the same week.

4. [The Lieutenant-Governor may from time to time appoint a person to fill the office of shorthand writer for the said courts, who shall be subject to the direction of the senior Judge, or, in his absence, to the direction of the junior Judge].

AN ACT TO AMEND THE ACT RESPECTING MORTGAGES AND SALES OF PERSONAL PROPERTY.

Her Majesty, &c., enacts as follows:

1. Where any mortgage of goods and chattels is registered under the provisions of chapter forty-five of the Consolidated

Statutes for Upper Canada, respecting Mortgages and Sales of personal property, such mortgage may be discharged, by the filing, in the office in which the chattel mortgage is registered, of a certificate signed by the mortgagee, his executors or administrators, in the form given in the Schedule hereto, or to the like effect.

2. The officer with whom the chattel mortgage is filed, upon receiving such certificate, duly proved by the affidavit of a subscribing witness, shall, at each place where the number of such mortgage has been entered, with the name of any of the parties thereto, in the book kept under the eighth section of the said Act, or wherever otherwise in the said book the said mortgage has been entered, write the words, "Discharged by certificate number (*stating the number of certificate*)," and to the said entry such officer shall affix his name, and he shall also endorse the fact of such discharge upon the instrument discharged, and shall affix his name to such instrument.

3. Where a mortgage has been renewed under section ten of the said Act, the endorsement or entries required by the preceding section to be made, need only be made upon the copy filed on the last renewal, and at the entries of such copy in the said book.

4. In case any registered chattel mortgage has been assigned, such assignment may, upon proof by the affidavit of a subscribing witness, be numbered and entered in the alphabetical chattel mortgage book, in the same manner as a chattel mortgage, and the proceedings authorized by the preceding sections of this Act may and shall be had, upon a certificate of the assignee, proved in manner aforesaid.

5. The affidavit required by the tenth section of the said Act may be made by any next of kin, executor or administrator of any deceased mortgagee, or by any assignee claiming by or through any mortgagee, or any next of kin, executor or administrator of any such assignee; but if the affidavit be made by any assignee, next of kin, executor or administrator of any such assignee, the assignment, or several assignments through which such assignee claims shall be filed in the office in which the mortgage is filed, at or before the time of such refiling by such assignee, next of kin, executor or administrator of such assignee.

6. For services under this Act, the said officer shall be entitled to charge twenty-five cents.

7. This Act shall be read as part of the said Act respecting Mortgages and Sales of Personal Property.

SCHEDULE.

To the Clerk of the County Court of the County of

I of do certify that has satisfied all money due on, or to grow due on a certain chattel mortgage made by to , which mortgage bears date the day of , A. D. , and was registered (*or in case the mortgage has been renewed under section ten*, was re-registered,) in the office of the Clerk of the County Court of the County of , on the day of , A. D. , as No. (*here mention the day and date of registration of each assignment thereof, and the names of the parties, or mention that such mortgage has not been assigned, as the fact may be*), and that I am the person entitled by law to receive the money, and that such mortgage is therefore discharged.

Witness my hand, this day of A. D.

One witness stating residence and occupation.

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

Re Randolph.

From C.C., Simcoe.] [Feb. 20.

Insolvency—Partnership.

Randolph and brother were lumber merchants, and carried on a grocery store and blacksmith's shop for the convenience of the men engaged in their mill. Peckham and Hoag received consignments of lumber from Randolph and brother, and accepted their drafts drawn against such consignments. P. & H. were paid one-half of the net profits of the business by way of commission. No provision was made in case

of a loss, but by a special agreement, P. & H. shared half a loss which occurred in one year. P. & H. had access to the Randolphs' books; and the yearly balancing was done under their supervision. One purchase of timber was made in the joint names of the Randolphs and a member of the firm of P. & H.; the cash having been advanced by the Randolphs alone. Subsequently the Randolphs dissolved. The business was carried on by Randolph the insolvent, and it was agreed between him and P. & H., that they should receive half the profits of the business, instead of a commission as formerly, and the amount due P. & H. at the time was carried to the debit of R.

P. & H. now claimed, as creditors of the insolvent's estate, for a balance due them. Their claim was resisted by the inspectors on the ground that a partnership existed between them and the insolvent.

Held, (Burton, Patterson, Moss, J.J.A., and Galt, J.,) affirming the judgment of the County Court, that P. & H. were not partners of the insolvent, and might therefore rank on the estate.

McMichael, Q.C., with him *McCarthy*, Q.C., for the appellants.

W. H. L. Gordon, for the respondent.

Appeal dismissed.

Re Niagara—Niagara v. Niagara.

From Q.B.] [Feb. 20.

High schools—37 Vict. cap. 27, O.

Held, (Hagarty, C.J.C.P., Burton, Patterson and Moss, J.J.A.) affirming the judgment of the Court of Queen's Bench, that under 37 Vict. c. 27, O., the High School Board for a district consisting of two municipalities, a town and township, could call upon one of the municipalities, the township, to contribute towards the erection of a school-house in the other municipality, and not merely towards its maintenance.

M. C. Cameron, Q.C., for the appellant.

J. A. Miller, for the respondent.

Appeal dismissed.

Brown et al v. Shaw et al.

From C.C., Wentworth.] [Feb. 20.

Implied contract.

The plaintiffs, living at Hamilton, sold a certain number of chests of tea, through a broker at Toronto, to the defendants, who were merchants at the latter place. Before shipping the goods, the plaintiffs ascertained the net weight of the tea by a mode well known to the trade, and sent an invoice charging the defendants for the number of pounds so ascertained. Some days after the receipt of the goods, the defendants wrote to the plaintiffs, refusing to remit their notes for the amount of the invoice, on the ground that the taring was incorrect, and added, "if you wish we will have more of them tared, or you can send down yourselves, when I will settle." One of the plaintiffs thereupon came down to Toronto, and the goods were retared in the presence of the broker and the defendants' agent, when it was ascertained that the defendants were chargeable with 95 lbs. more than the plaintiffs had originally claimed. The defendants then sent their notes for the amount charged in the original invoice, and refused to pay for the additional 95 lbs..

The Court (Burton, Patterson, Moss, J.J.A., and Galt, J.) *held*, allowing the appeal, that the defendants had bound themselves by their letter and conduct to abide by the result of the retaring at Toronto.

C. Robinson, Q.C., for the appellants.

Rose, for the respondents.

Appeal allowed.

Gilleland v. Wadsworth.

From Chancery.] [Feb. 20.

Mortgagor and mortgagee—Assignment—Notice—Payments on mortgage—Registration.

B., being the owner of Whiteacre, mortgaged the same to C., who sold and assigned the security to J., which assignment was duly registered, and afterwards B. agreed with W., the owner of Blackacre, to effect an exchange of properties, B. agreeing to have the mortgage which he had executed to C., transferred from Whiteacre to Blackacre, which C. assented to, and the arrangement was finally carried out in the manner proposed, C., who was a solicitor, being the party employed to prepare the several conveyances, including the mortgage from B. to himself, upon the newly acquired property (Blackacre). No mention was made of the first mortgage by either party on this occasion, and B. continued to pay C. the interest, and ultimately the principal, when he obtained a discharge of the mortgage on Blackacre, C. all the while continuing to pay J. the interest accruing due upon the mortgage on Whiteacre.

Held, (Burton, Patterson, Moss, J.J.A., and Blake, V.C.,) that the payments so made by B. to C. had not the effect of discharging the mortgage on Whiteacre, and that the assignee thereof could enforce it against W.; and (2) that W. was affected with notice of the transfer of the mortgage by reason of the registration thereof;

and (3) that it was not necessary to set up the registration of the assignment in the bill.

TAYLOR v. TAYLOR ET AL.

From Chancery.] [Feb. 20.

Principal and Agent—Trustee and cestui que trust.

In 1847, the plaintiff being about to leave Canada, conveyed certain lands in which he had a right of pre-emption, to his brother—one of the above named defendants. Only a small portion of the purchase money had been paid, and no provision was made by the plaintiff for the payment of the balance. In April, 1851, the brother assigned the land to the plaintiff without consideration and without his knowledge, for the purpose either of denying his title to the land in a suit brought by one Canniffe, who was in possession of the land claiming adversely; or to prevent the bringing of a *qui tam* action. The brother paid the residue of the purchase money without the plaintiff's aid or knowledge, and a deed issued in the plaintiff's name. In October of the same year, the plaintiff executed a power of attorney, enabling him to sell the land in question, mentioning it specifically, and a general power to sell or lease any lands which he owned in Canada. In 1856, the brother conveyed the property to W. for the alleged consideration of $1000; who immediately reconveyed one-half the land to the brother for the alleged consideration of $200. The plaintiff returned to Canada in 1873, and filed a bill impeaching the transaction between his brother and W., and seeking to have them declared trustees for him.

At the hearing the plaintiff and his brother compromised their difficulties.

The Court (Harrison, C.J., Burton, Patterson, J.J.A., Hagarty, C.J.C.P. dissenting), *held*, that the defendant Taylor was the beneficial owner of the land at the time of the conveyance to Wallbridge, and refused to set aside the conveyance.

Bethune, Q.C., (with him *Dickson*,) for the appellant.

Wallbridge, Q.C., and *Fitzgerald*, Q.C., for the respondent Wallbridge.

Appeal dismissed without costs.

MONAHAN v. OKE.

From C.C., Northumberland & Durham.] [Feb. 20.

Assumpsit—Illegitimate children—C.S. U.C. cap. 77, sec. 4.

Held, (Burton, Patterson, Moss, J.J.A., and Galt, J.) affirming the judgment of the County Court, that an action of assumpsit will lie against an executor for the maintenance of an illegitimate child of the testator, under C.S. U.C. cap. 77, sec. 4.

Benson, Q.C., for the appellant.

Osler for the respondent.

Appeal dismissed.

MCARTHUR v. SMITH.

From C.C., Wentworth.] [Feb. 20.

Bills and notes—Mutual insurance company.

Held, (Burton, Patterson, Moss, J.J.A., and Galt, J.) that a promissory note made to a Mutual Insurance Company, or its officers, under C.S. U.C. 52, sec. 21, is negotiable.

J. K. Kerr, Q.C., for the appeal.

Osler for the respondent.

Appeal allowed.

WALKER v. HYMAN.

From C.C., Middlesex.] [Feb. 20.

Estoppel.

The plaintiffs were makers of safes at Toronto. One Hergert of London, gave them a written order for a safe, for which he was to give his promissory notes at four and six months. The order contained a direction to have his name painted on the front of the safe, and it was stipulated on a printed form, furnished by the plaintiffs and appended to the order, that no title to the safe was to pass to Hergert until full payment of the price agreed upon. In compliance with the order, the plaintiffs had Hergert's name painted on the safe, and delivered it to him in August, 1876. Hergert gave his notes at four and six months in payment. In November of the same year, the defendant purchased the safe—after having first searched the office of the Clerk of the County Court for encumbrances against it, and believing it to belong to Hergert.

The Court, (Burton, Moss, J.J.A., and Galt, J., Patterson, J.A., dissenting,) that the plaintiffs were not estopped from asserting their ownership, and that they were entitled to recover the amount due on the safe.

Merritt for the appellant.

MacMahon, Q.C., for the respondent.

Appeal allowed.

MILLER v. HEWITT.

From C.C., York.] [Feb. 20.

Married woman—Insolvency.

A married woman transferred certain shares, which formed part of her separate estate, to her

husband, upon a promise of repayment by him of their value.

The Court, (Burton, Patterson, and Moss, J.J.A.,) *held*, that she was entitled to rank on his estate as a creditor, he having subsequently become insolvent, but that such a claim should be submitted to the most rigid investigation, and must be supported by the most clear and convincing evidence when being proved before the assignee.

W. A. Foster, with him *J. B. Clark*, for the appellant.

R. N. Miller for the respondent.

Appeal allowed.

Wood v. McAlpine.

From C.P.] [Feb 20.

Assignment of chose in action—35 Vict. cap. 12, O.—Meaning of "Assignee"—Amendment.

The plaintiff, as assignee of one Munro, an insolvent, sold the insolvent's stock and business to one Smith, but without the preliminary advertisement required by the Insolvency Act for sales *en bloc*. Munro who was retained by Smith as his clerk, sold part of the stock to the defendant. Smith being in doubt whether the right of action for the goods so sold was in himself or in the plaintiff, executed a writing before this suit, purporting to assign his claim against the defendant to the plaintiff. No beneficial interest passed, or was intended by this writing to pass to the plaintiff, who sued in this action in his character as the insolvent's assignee, but really for Smith's benefit.

Held, (Burton, Patterson, Moss, J.J.A., and Galt, J.,) affirming the judgment of the Court of Common Pleas, that the plaintiff was properly non-suited, as he did not possess the beneficial interest in the debt sued on : 35 Vict. cap. 12, sec 3, O.

An application to allow Smith to be added as a plaintiff, was refused at this stage, as such an amendment could only be upon payment of all costs, and this would be of no practical benefit to Smith, who can sue in his own name.

C. Robinson, Q.C., (with him *Foy*,) for the appellant.

M. C. Cameron, Q.C., for the respondent.

Appeal dismissed.

QUEEN'S BENCH.

HILARY TERM.

(Present, Harrison, C.J., Morrison, Wilson, J.J.)

Barnard's Banking Co. v. Reynolds.

"(English) Companies Act 1862"—Order for Calls—Right of action—Liability of past member.

Held, (Wilson, J. dissenting) that an action for calls will not lie in this country on an order made under "The Companies Act, 1862," in England, on the winding up of the company against a past member in respect of shares formerly held by him at the suit of the company.

C. Robinson, Q.C., and *L. Gordon*, for plaintiffs.

S. Richards, Q.C., for defendant.

Leprohon v. Ottawa.

Power of Local Legislature—Taxation of income of Dominion officers.

This was an action brought by plaintiff, an officer of the Dominion House of Commons, for trespass and trover, arising from the collection of taxes from him for income derived from the salary paid him by the Dominion. It was objected *inter alia*, that the Government of Ontario had no power to authorize municipalities to tax the salaries paid by the Dominion to its officers. *Held*, (Harrison, C.J.,) dissenting, that the Local Legislature had such power, and that the plaintiff's income was properly assessed.

C. Robinson, Q.C., for the plaintiff.

Bethune, Q.C., for the defendants.

Hall v. Merrick.

Married woman—Guarantee for husband.

Plaintiff, who had previously endorsed for J.D.M., husband of defendant, Sarah M., on being again applied to, refused to endorse unless indemnified. J. D. M. proposed to give his wife's guarantee, which was agreed to by plaintiff. J. D. M. obtained his wife's signature to an ordinary blank form of promissory note, without any knowledge on her part of the use to be made of it. This was to be filled up for a large amount, and at the plaintiff's request, the words 'This note to be held as collateral security" were inserted before value received at the end of the note. The defendant swore that she gave the blank to be used as a note and never authorized its use as a guarantee.

Held, not a guarantee.

J. K. Kerr, Q.C., for plaintiff.

E. Crombie, for defendant.

VACATION COURT.

Re Strachan and the County of Frontenac.

Wilson, J.] [March 2.

County—Power of.

A county by-law granting money to aid local municipalities within it in improving roads &c. of a local character is *ultra vires.*

Ewart for the applicant.

Bethune, Q.C., contra.

Third National Bank of Chicago v. Cosby.

Wilson, J.] [March 2.

Promissory note—Uncertainty—'American Currency.'

A promissory note made in Ontario, payable in the United States, is not void for uncertainty because payable in "American currency."

McMichael, Q.C., for plaintiff.

Benson, Q.C., for defendant.

Fitzgerald v. Johnston.

Galt, J.] [March 6.

Chattel mortgage—Sufficiency of description.

Special case. Plaintiff held a chattel mortgage upon "all the goods, chattels, furniture, and household stuff whatever," of one H., in and upon a certain hotel, stables, and premises, and referred to the goods, &c., as more particularly described in the schedule annexed.

Held, that the description in the mortgage would not, without more, pass a horse of H.'s to plaintiff, as against defendant, a creditor of H.

The schedule contained the words, "yard and stables, 1 omnibus, 2 bay horses aged, the whole of the above named property, goods, chattels, household furniture, horses," and referred to them as being in and upon the hotel premises, &c. It was admitted that the horse in question was not particularly mentioned in the schedule. *Held*, that the horse did not pass.

Semble, that only property in the nature of household property passed.

CHANCERY.

RE-HEARING TERM.

Re White—Kersten v. Tane.

Undue influence—Bona fides—Mental capacity.

W., the holder of a policy of insurance on his life, who had fallen into habits of intemperance, which greatly enfeebled his bodily health, although his mental faculties remained sufficiently unimpaired to enable him to understand business, assigned this policy to T., his brother-in-law, a clergyman, for his own benefit; and on the following day executed his will, appointed T. his sole executor, and thereby bequeathed his effects, which were of but trifling value, to several of his relatives. No entry of the assignment of the policy was made in the books of the insurance company, and the premium afterwards paid was paid in the name of W. T., on applying for the payment of the insurance money, represented himself as the assignee and executor of the deceased.

Held, on rehearing, affirming the decree of Blake, V.C., as reported in 20 Gr., p. 547, that the circumstances were not such as shifted the onus of proof, and called for evidence on the part of T., that the assignment was *bona fide*, and that he had not exercised any influence over the deceased in obtaining the same.

Maclennan, Q.C., for plaintiff.

Moss for defendant.

Adams v. Loomis.

Husband and wife—Alimony suit—Valuable consideration—Married Women's Property Act, 1872.

Held, affirming the decree pronounced in 20 Gr., page 99, that the compromise of an alimony suit is a sufficiently valuable consideration for a deed from the husband to the wife.

Held, also, affirming the same decree, that a wife's conveyance of her equitable estate is valid without the husband joining in the deed; and, the husband having the legal estate vested in him, the wife's vendee could compel a conveyance by the husband.

The Married Women's Property Act, 1872, applies to cases where lands have been acquired by married women after the passing of that Act, although the marriage took place before the Act came into force. [Per Proudfoot, V.C.]

Boyd, Q.C., for plaintiff.

Armour, Q.C., and *Maclennan*, Q.C., for Loomis.

Hiscox v. Lander.

Nuisance — Executive Councillor — Commissioner of Public Works—Parties—Practice—Rehearing.

By the statute 32 Vict. cap. 28, O., all the public buildings and works are placed under the control and management of the Commissioner of Public Works, but the Act negatives any authority of that officer to "cause expenditure not previously sanctioned by the Legislature, except for such repairs and alterations as the immediate necessities of the public service may demand." The London Lunatic Asylum was

erected under the provisions of an Act of the Legislature, and the drains of it were constructed in such a manner as to discharge into a stream crossing the lands of the plaintiff, thereby causing a serious nuisance to the plaintiff. To remedy this it was alleged that the only effectual means was to carry the sewage to the river Thames, at an estimated cost of $30,000.

Held, that the Commissioner of Public Works could not be restrained by injunction from allowing the nuisance to continue. [SPRAGGE, C., dissenting].

Per SPRAGGE, C.—The stream which had thus been polluted had not been acquired by the Commissioner under the Act, and it was not a drain to carry off water from a public work that had been constructed by the Commissioner, and therefore it was not such an act as the statute authorizes, even if it had been properly done.

Semble, To such a suit the medical superintendent of the Asylum is not a proper party.

Where a cause is re-heard at the instance of some of the defendants against whom relief has been granted, it is necessary that a defendant against whom the bill was dismissed at the original hearing should be before the Court on the re-hearing.

Bethune, Q.C., and *Moss* for plaintiff.

Mowat, Q.C., *Maclennan*, Q.C., *Boyd*, Q.C., and *Vidal* for defendants.

WALKER v. WALTON.

BLAKE, V.C.] [Nov. 29, 1876.

Mechanics' Lien Acts of 1873 and 1874, O.—Cancelling lien—Demurrer.

The effect of the Mechanics' Lien Act of 1874 is, to cancel a lien that had been created under the Act of 1873, although a bill to enforce the claim had been filed within ninety days from the expiry of the period of credit as prescribed by the 4th section of that Act; no proceeding to realize the claim having been taken for more than thirty days after the machinery, the foundation of the claim, had been supplied; the provisions of the Act of 1873 being inconsistent with, and repugnant to the provisions of the later Act, which repeals all Acts inconsistent therewith.

A. F. Campbell for demurrer.

J. H. McDonald contra.

BOTHAM v. ARMSTRONG.

BLAKE, V.C.]

Insolvent—Indorser—Preferred creditors—Sec. 133 of the Insolvent Act, 1875.

A trader being in embarrassed circumstances sold out his business, and out of the proceeds satisfied a promissory note on which his brother was indorser, before it had become due, and shortly afterwards went into insolvency. The evidence did not shew that the indorser was aware or was party to the payment in any way, and it was by no act of his that the note was so paid.

Held, under the circumstances, that the assignee in insolvency had no right to call upon the indorser to refund the amount of such note; but,

Where the payment of a note had been procured by the indorser, he was under the 89th section of the Insolvent Act of 1869, [in effect the same as section 133 of the Act of 1875], held liable to make good the amount thereof.

Gibbons for plaintiff.

J. W. Bowlby for defendant.

PRINCE v. LOUGH.

BLAKE, V.C.]

Practice—Demurrer filed—Demurrer ore tenus—Costs.

Where a demurrer was filed which on argument was overruled, and a demurrer then taken *ore tenus* was allowed, the Court allowed the latter without costs; although costs were given to the plaintiff of the demurrer that was overruled, following the decision in *Roche* v. *Jordan*, 20 Gr. page 373.

O'Sullivan, for demurrer.

Fitzgerald, Q.C., contra.

BALL v. CANADA COMPANY.

BLAKE, V.C.]

Lessor and Lessee—Purchase on condition.

Where there is a contract between the owner of lands and another person, whether lessee or not, that if such person shall do a certain specified act he shall be at liberty to buy the property, in such a case, time is of the essence of the contract, and until the performance of the act which has been so stipulated for, the relation of vendor and purchaser does not exist between the parties: therefore, where The Canada Company granted the plaintiff a lease of certain lands, whereby amongst other things, they agreed that if the lessee duly paid certain rents and taxes, and should not cut or sell, or suffer, or permit to be cut or sold any timber or other trees growing on the lands, except for the purposes of clearing and the use of the premises, he should be at liberty to purchase the same at a certain named price, and it was admitted that default had been made as well in regard to the payment of rent and taxes as to the cutting of timber, it was *held* that a right

to insist upon a sale was forfeited, notwithstanding the lessee's offer to make good the rent and taxes, and pay the amount of purchase money agreed upon.

Boyd, Q.C., and *Stephens*, for plaintiff.

J. H. Cameron, Q.C., and *H. Murray*, for defendants.

NASH v. GLOVER.

PROUDFOOT, V.C.]

Public Highway—Lengthened possession of original road allowance—Statute of Limitations—Extinction of right.

The public cannot release their rights; and there is no extinctive presumption or prescription; therefore where an original allowance for road had been taken possession of, and occupied by the plaintiff, and those under whom he claimed, for a period of forty years and upwards:

Held, that such lengthened possession afforded no ground for opposing the action of the municipality in resuming possession of the road for the purpose of opening the same.

R. Martin and *Lemon* for plaintiff.

B. Osler, Q.C., for defendant Flatt.

Moss for defendant Glover.

HELLEM v. SEVERS.

PROUDFOOT, V.C.]

Will, construction of—Inconsistent words—Executrix beneficially interested—Costs—Inops consilii.

A testator in a will containing inconsistent provisions, devised certain real estate, after the death of his daughter, to his grandsons, J. & F., "to hold as joint tenants, and not as tenants in common. To have and to hold the same to them during their joint lives; and to the survivor of them; and to their male heirs after their, or either of their decease; and to their heirs and assigns for ever," and in case of the death of F., without leaving lawful issue, then the portion that would have belonged to him if living, the testator gave to another grandson H. for his life, and after his death, to his heirs and assigns forever.

Held, that the remainder, after the death of the daughter, went to J. & F. as joint tenants for life, with several inheritances in tail male, and with remainder in fee as to F.'s part to H.

The same will contains the following devise: "My will is that after the decease of my daughter Bridget, and after the decease of all my sons in law, James Esmond, John Emery and John Severs, and not before they are all deceased, then my will is, that the money and mortgages belonging to my estate is to be devised into equal parts and paid to my grand-children, equally amongst all my grand-children; but in case of the death of any of my grand-children before the death of my daughter Bridget, and before the death of all my sons-in-law, leaving lawful issue, then the share that would have belonged to my grand-child, if living, shall go and belong to the lawful issue of such deceased grand-child."

Held, that the estate was not to be divided till 21 years from the death of the testator, and not then unless his daughter and three sons-in-law were dead; and that all the grand-children living at his death took an immediately vested interest, subject to be divested *pro tanto* as the number of grand-children should be increased by future births before the period of distribution.

The testator directed that F. should be sent to college and his expenses paid for out of his estate by his executors. The estate consisted of land only, after taking out a specific bequest of the furniture and the expenses of the funeral; *Held*, that the land was charged with the bequest.

Where a testator provided that the executrix was to have the sole management during her life, and the executors were to manage afterwards; and the latter filed a bill against the executrix without sufficient cause they were not allowed their costs; but the matter having been brought to the notice of the court, a decree for an account was made as respected the executrix.

The person who was to have the sole control and management of the estate being entitled beneficially to the interest on the investments, the court refused to order a transfer in court.

When a will, though prepared by a solicitor, was so inconsistently worded, that but little benefit could be derived from his labours in its construction, the court thought that as liberal an interpretation should be made of the language, in order to ascertain the intentions of the testator, as if he had been in fact *inops consilii*.

Meek, for plaintiff.

Hoskin, Q.C., *Delamere* and *Black*, for the defendant.

LIFE ASSOCIATION OF SCOTLAND v. WALKER.

PROUDFOOT, V.C.] [Jan. 10.

Trustees and cestui qui trust—Commission—Practice—Further directions—37 Vict. cap. , Ont.)

The rule of decision in Equity which requires that the expenses incurred by a trustee in the execution of his office shall be satisfied before the *cestui qui trust*, or his assignee can compel

a conveyance of the trust estate, applies to the commission or allowance to a trustee for his care, pains and trouble under the Act of Ontario, 37 Vict. cap. 9.

Whereon a reference to a Master to take an account of a trustee's dealings with an estate, that officer omitted to ascertain the amount of the trustee's charges, costs, &c., a reference back to ascertain it was directed at the hearing on further directions; and the fact of the Master having reported that the trustee had omitted to keep any regular set of books shewing a debtor and creditor account of his dealings with the estate, but did not state that for that reason he had been unable to ascertain the amount, was not considered a sufficient reason for his having omitted to find the amount of such claim.

Fitzgerald, Q.C., for plaintiffs.

W. Cassels, for defendants.

Re Credit Valley Railway Company and Spragge.

Proudfoot, V.C.] [Jan. 10.

Railway company—Valuing lands taken for railway—Arbitration—Costs.

Where arbitrators are appointed to award compensation for lands taken for the purposes of a railroad, and assess the damages sustained by the proprietors by reason of the severance of the lands, the arbitrators may properly take into consideration the increased value to the estate by reason of the construction of the railroad, although benefited only in the same way as other farms in the neighbourhood through which the railroad does not pass; as also the increase in value by reason of the probable location of a station at a town in the vicinity of the lands, and which the company had bound themselves to place there in consideration of a bonus paid by such town.

Although the statute (C.S. U.C. cap. 66) directs that when the sum awarded for lands taken for a railroad is less than that tendered, the costs shall be borne by the owners; the same rule does not apply as to the costs of an appeal to this Court, they being then in the discretion of the Court, who, under the circumstances, dismissed this appeal without costs.

R. M. Wells for the company.

O'Brien contra.

Billington v. Provincial Ins. Co.

Proudfoot, V.C.] [Jan. 31.

Fire insurance—Agent of company—Agent of assured—Prior insurance—Notice to agent of company.

On the 6th February, 1875, the plaintiff applied to the agent of the defendants at Dundas, to effect an insurance for two months from that date, for which he paid the premium demanded and obtained an interim receipt, but, before a policy was issued to the plaintiff, the property was destroyed by fire; and it was shewn that it was not usual to issue policies for short risks—but after the fire occurred, a policy was issued on which were indorsed, amongst other conditions, one, that notice of all previous insurances upon the property should be given to the company and indorsed on the policy, or otherwise acknowledged by them in writing; and another, that if the agent of the company made the application for the insured, he should be considered the agent of the insured, and not of the company; but no intimation of such a condition appeared on the receipt given to the plaintiff. When the insurance was applied for, the plaintiff informed the agent of the existence of a prior insurance on the same property in another company, (the same person was, in fact, agent for both companies), and expressed great anxiety to have the same properly acknowledged by the company; but it appeared that the agent had omitted to communicate the fact of such prior insurance to his principals. It was proved by the manager of the defendants, that it was the duty of the agent to receive applications for insurance, and part thereof would be the existence of other insurances. In an action brought to recover the amount of the policy, the company raised several defences of false representations by, and fraudulent contract on the part of the insured, all of which were either abandoned or disproved at the trial; the defence being finally rested on the want of notice of prior insurance and the question of agency.

Held, under the circumstances stated, that the plaintiff was entitled to recover the amount of loss sustained by him together with his costs of suit, the amount of which the company were ordered to pay forthwith.

B. Osler, Q.C., and *Moss* for plaintiff.

Huson Murray for defendants.

McKillop v. Smith.

Blake, V.C.] [Feb. 14.

Demurrer—Pleading.

Where a bill by a municipality seeking to restrain the defendants from obstructing a highway in one paragraph alleged that the defendants "have fenced or allowed the same to be fenced," and in another paragraph that they were "in the occupation and possession of the said side line * * and have prevented and still prevent the inhabitants * * and the public at

large from travelling on and over the said line * * and have refused and still refuse to open the said line or to allow the plaintiffs to do so," and that the defendants claimed they were entitled to the road.

Held, on demurrer for want of equity, that the allegations taken together were sufficient to entitle the plaintiffs to the relief; although had the only allegation been that the defendants had "fenced or allowed the same to be fenced," it would not have entitled the plaintiffs to the injunction prayed for.

Maclennan, Q.C., for demurrer.

A. Hoskin, contra.

Re Harris—Harris v. Harris.

Blake, V.C.] [March 6,

Costs of contentious suits in Surrogate Court.

Where a suit in the Surrogate Court is by order removed into Chancery, and that Court directs any of the parties to receive their costs; the costs to which they are entitled are those fixed by the Court of Chancery tariff—not the costs of the Probate Court in England, or of the County Courts here; no tariff of costs for contentious cases in the Surrogate Courts here having yet been established.

R. M. Meredith for the plaintiff.

Geo. Murray for defendants.

Bolckow v. Foster.

Proudfoot, V.C.] [March 14.

Pleading—Parties.

Held, that to a bill by a surviving partner to foreclose the equity of redemption of defendants in railway mortgage bonds and shares, the mortgage of the bonds and shares being in favor of the partnership firm, the personal representatives of the deceased partner are not necessary parties; in this over-ruling *Sykes* v. *Brockville & Ottawa Railway Co.*, 9 Gr. 9 (1862).

Crooks, Q.C., *Smith* and *Rae* for plaintiff.

Bethune, Q.C., *Boyd*, Q.C., and *W. Cassels* for defendants.

Cochrane v. Franklin.

Chancellor.] [March 16.

Fi. fa. against mortgagee—Restraining disposition of mortgage.

On a bill filed by a judgment creditor with *fi. fa.* in hands of sheriff, the Court restrained the defendants from selling, assigning, or otherwise disposing of a mortgage held by him, created by one T. in favor of one S., and by S. assigned to the defendant. For the purpose of obtaining a *lis pendens*, the plaintiff was entitled to proceed in equity, notwithstanding the provisions of the Administration of Justice Act.

[In future, however, this will not be the case, as during the last session power was given to the Common Law Courts to grant a *lis pendens*].

Moss for plaintiff.

Stewart v. Lees.

Chancellor.] [March 16.

Proof of execution of will—Attestation clause—Probate.

Where probate of a will is produced at the hearing, in pursuance of notice served under the statute 22 Vict. cap. 93, and the opposite party does not serve notice of an intention to dispute the validity of the alleged devise, the probate will be sufficient evidence of such will and of its validity and contents; but if, the notice to dispute having been served, the will does not appear to have been duly executed, the Court will give liberty to adduce further evidence, by affidavit or otherwise, to shew that the several requisites of the 4 Wm. 4, cap. 1, as to the execution of wills had been complied with.

Fitzgerald, Q.C., for plaintiff.

Maclennan, Q.C., for defendant.

CANADA REPORTS.

ONTARIO.

SEVENTH DIVISION COURT—LEEDS AND GRENVILLE.

Healy v. Carey.

The plaintiff, who was collector of the Roman Catholic Separate School tax, for and in the Township of Kitley, having sued the defendant for the amount of a Roman Catholic Separate School tax, the latter admitted that he was a separate school supporter, but contended that he had leased his real estate to his son who was a supporter of public schools, and who, as between defendant and himself was to pay all taxes and had paid the public school tax.

Held, 1. That the defendant was liable.

2. That the action should have been brought in the name of the trustees as a corporation, and an amendment allowed.

[Brockville, February 6, 1877.

This cause was tried before the Junior Judge of the County Court of Leeds and Grenville at Frankville on the 16th January, 1876. The action was brought to recover $8.31, amount due from the defendant as school rates for 1876, embracing the collector's rate for collecting.

The defendant did not dispute the fact of his being a supporter of the Roman Catholic Separate School, and indeed it was proved that he had been one of the trustees during the previous year. But he contended that his real estate was leased to his son who was to pay the taxes and was a supporter of the public schools, and as such was to pay or had paid the public school tax. He also contended that the assessment had not been equalized, but nothing turned upon this.

The Judge reserved judgment and named a subsequent day and hour for the delivery thereof. He also intimated that in his opinion the action should have been brought in the name of the trustees instead of by the collector, but directed that any necessary amendment as to this might be made.

Judgment was subsequently given as follows:

MCDONALD, J.J.—I have given the matter most careful consideration and the principal difficulty with which I have been met is this: That if the defendant is compelled to pay this tax, the farm upon which the assessment was made, will have been taxed for the support of two schools. Out of this also arises a possible question of the tenant having to pay taxes towards the support of a public school and of a Roman Catholic Separate School, as he is, under the terms of his lease, obliged to pay taxes.

Again on the other hand if the collector of the public school tax applied to the owner for payment of that assessment the latter could refuse to pay it on the ground that he was a supporter of the Roman Catholic Separate School, and not liable to pay a public school tax.

The 7th section of the Separate School Act, of 1863, 26 Vict. cap. 5, enacts that, "The "Trustees of Separate Schools forming a body "corporate under this Act, shall have the "power to impose, levy, and collect school rates "or subscriptions upon and from persons send- "ing children to or subscribing towards the "support of such schools, and shall have all "the powers in respect of Separate Schools, "that the Trustees of Common Schools have "and possess under the provisions of the Act, "relating to Common Schools."

The 14th section of the same Act of 1863, amongst other things enacts that, "Every per- "son paying rates, whether as proprietor or "tenant, who, by himself or his agent, on or "before the first day of March in any year "gives, or who, on or before the first day of "March of the present year, has given to the "Clerk of the Municipality notice in writing "that he is a Roman Catholic, and a supporter "of a Separate School, situated in the said Mu- "nicipality, or in a Municipality contiguous "thereto, shall be exempted from the payment "of all rates imposed for the support of Com- "mon Schools, and of Common School Libra- "ries, or for the purchase of land or erection of "buildings for Common School purposes within "the City, Town, Incorporated Village, or sec- "tion in which he resides, for the then current "year, and every subsequent year thereafter, "while he continues a supporter of a Separate "School; and such notice shall not be required "to be renewed annually."

In my humble judgment the defendant, being a Roman Catholic, and a supporter of the Separate School, under the provisions of the 14th section above mentioned is wholly exempt from the payment of Public School rates, while under the provisions of the 7th section the Trustees of the Separate School had power to impose school rates or subscriptions upon him and have power to collect the same. My judgment is therefore against the defendant.

In my opinion the action should have been brought in the name of "the Trustees of the Roman Catholic Separate School for the section number seven in the Township of Kitley" and I direct that the summons, particulars of claim, and other papers and proceedings be amended accordingly. No objection was taken by the defendant as to the action having been brought in the name of the wrong plaintiff, but I myself raised the question.

Judgment for the plaintiff.

COUNTY COURT—COUNTY OF ONTARIO.

RIDDELL v. MCKAY.

38 Vict. cap. 26, O.—Ditches and water courses.—Jurisdiction of fence-viewers.

The Act respecting Ditching and Water-courses (38 Vict. cap. 26, O.) is only applicable where the lands belonging to *each* of the adjoining owners is benefited by the work.

Where, therefor fence-viewers awarded that R. should pay for and maintain a portion of a drain and water-course, which was only of benefit in draining McK.'s land, the award was set aside.

This was an appeal by Riddell from the award of the fence-viewers of the township of Thorah, which directed him to make and maintain about five rods of ditching, and ordered him to pay the costs or the award, which purported to be made under the Act respecting Ditching and Water-courses, (38 Vict. cap. 26). Riddell is the owner of lot 4, and McKay of lot 5, in the 5th concession of Thorah. Through the land of the former a ravine, or creek, runs in a southerly

direction, and on the land of McKay is a swampy or miry piece of ground. Evidence was conflicting as to whether the natural drainage of this piece flowed to the west, or easterly, towards the creek. McKay cut a drain eastward to drain the swamp, but to reach the ravine had to cross about five rods of Riddell's land. It was in respect of this five rods of ditching that the award was made. The evidence also showed that McKay could have drained to the west or south without crossing Riddell's land; and it was shewn that the drain was of no benefit to the latter.

Dartnell, J.J.—I think the fence-viewers have misconceived the obvious meaning of the Act, and that they had no jurisdiction at all in the premises. The cases provided for under section are: (1.) The *making* of a ditch or drain. (2.) The *deepening* or *widening* a ditch or drain already made in a natural water-course. (3.) The *making, deepening*, or *widening* a ditch or drain for the purpose of taking off surplus water from swamps or low miry land. The section applies this to "adjoining lands which would be benefitted" in any of the above mentioned instances.

Now in this case the benefit is all on one side; and it seems to me not to be contemplated by this Act that B. should be called upon to pay for building a drain for the sole benefit of his neighbour A. I can well understand, that when a swamp or marsh lies partly on the land of A., and partly on that of B., that B. might fairly and properly be called upon to pay his fair proportion of the cost of a drain which would "benefit his land," although the whole of such drain might be on his neighbour's soil. This is not the case here. On the contrary, Riddell has no land which has benefitted by the drain in question, and it is manifestly unjust that he should be called upon, under these circumstances, to contribute anything to the cost of McKay's drain, and still less pay the costs of the award. The language of the 6th section, I think, is confirmatory of this view. In that section it is directed that "the fence-viewers in making their award shall regard the nature of the ditches or drains in use in the locality and generally *the suitableness of the ditch or drain ordered to the wants of the parties.*" Now, however suitable the drain in question may be to the wants of McKay, I do not think it can be said to be suitable to Riddell's wants. In fact he takes the position that he does not want it at all, and that it is of no use or benefit to him whatever. It might be a just and convenient thing that a farmer should be enabled to continue his own drain across his neighbour's land into its natural water-course, but I do not think the Act in question gives him that privilege, or confers on the fence-viewers the power of awarding it.

I made an order setting aside the award with costs to be paid by the respondent to the appellant.

N. F. Patterson, for appellant.

C. C. Keller, for respondent.

CORRESPONDENCE.

Mechanics' Lien Acts.

To the Editor of the Law Journal:

Sir,—I fully concur in your views upon these acts contained in your November number. More wretched specimens of legislative workmanship could not easily be found.

For example, the 4th clause of the Act of 1874, respecting mortgaged lands. The last six lines are clothed in extraordinary verbiage. I have no doubt the attempted meaning was that the claim of the mortgagee should be restricted to the value of the lands irrespective of the improvements made by the mechanic. The clause is too long for insertion, but if any of your readers will take the trouble to turn to the clause he will find the extraordinary method taken to confound the intention.

A decree was issued lately at the instance of a mechanic, for the sale of the lot on which the improvements had been made, on which a previous mortgage existed, and the consideration of the decree and of the acts caused a considerable bewilderment. To add to this the decree declared that the plaintiff should, in the first place, be paid his costs, and then his claims. It happened, however, that another mechanic had a lien, and under the 9th clause it is declared that all lien-holders in their class shall rank *pari passu*, and the proceeds of the sale be distributed amongst

them *pro rata*. Under the decree the plaintiff would take everything and leave nothing for the second lien-holder.

In another case a lien-holder, to the amount of $32, was made a party in the Master's office, although it was scarcely to be presumed from his position, as a workman, that he would be disposed to redeem a mortgage of some $1,200 which was ahead of him.

I think it will be found necessary to repeal the acts *in toto*.

"Scrutator."

Co. Huron, Feb. 14th, 1877.

Gentlemen,—I have seen in the Law Journal, noticed by you, some strangely worded "country conveyancers' cards," but I think the following beats them all:

—— ——— Conveyancer, Commissioner in B.R., and General Merchant, 12 Main street, ———, Ontario. Deeds, Mortgages, Leases, Wills, Arbitration papers, Letters of Administration, and everything in the line executed carefully and with dispatch. Money always on hand to lend at reasonable rates. Motto—Always at home.

Is it any wonder when such persons are allowed to do such as this person asks to be allowed to do, that there are such large sums expended in law costs, to find out what they intended others should understand by their interesting documents? No wonder you are often asked to construe passages in wills, &c. When such persons are allowed to carry on this sort of work (and there are many of them) it is rather a bad look-out for the last batch of students, as well as those who are practicing. Surely there should be some protection for those who have expended so much time and money in acquiring their profession from the pilfering of such gentry. The medical men have the laugh on us.

Yours, &c.,

Student-at-Law.

FLOTSAM AND JETSAM.

When Mr. Webster visited England, after he had gained fame enough to precede him, an English gentleman took him one day to see Lord Brougham. That eminent Briton received Daniel with such coolness that he was glad to get away and back to his rooms. The friend who had taken him at once returned to Lord Brougham in haste and anger. "My Lord, how could you behave with such unseemly rudeness and discourtesy to so great a lawyer and statesman? It was insulting to him, and has filled me with mortification." Why, what on earth have I done, and whom have I been rude to?" "To Daniel Webster of the Senate of the United States." "Great Jupiter, what a blunder! I thought it was that fellow Webster who made a dictionary and nearly ruined the English language." Then the great Chancellor quickly hunted up the American Senator, and having other tastes in common besides law and politics, they made a royal night of it.—*Exch.*

CHANCERY SPRING CIRCUITS.

THE HON. THE CHANCELLOR.

Toronto	Tuesday	May 15th

THE HON. THE CHANCELLOR.

The Eastern Circuit.

Lindsay	Tuesday	March 20th
Peterborough	Friday	March 23rd
Kingston	Wednesday	March 28th
Ottawa	Tuesday	April 3rd
Cornwall	Tuesday	April 17th
Brockville	Friday	April 20th
Belleville	Thursday	April 26th
Cobourg	Thursday	May 10th

THE HON. VICE-CHANCELLOR BLAKE.

The Home Circuit.

St. Catharines	Friday	March 16th
Simcoe	Tuesday	March 20th
Brantford	Thursday	March 22nd
Whitby	Monday	March 26th
Hamilton	Monday	May 14th
Barrie	Friday	May 25th
Owen Sound	Thursday	May 31st
Guelph	Monday	June 4th

THE HON. VICE-CHANCELLOR PROUDFOOT.

The Western Circuit.

Goderich	Thur-day	March 29th
Stratford	Tuesday	April 3rd
Woodstock	Tuesday	April 10th
Sarnia	Tuesday	April 17th
Sandwich	Friday	April 20th
Chatham	Tuesday	April 24th
London	Tuesday	May 1st
Walkerton	Thursday	May 10th

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Hilary Term, 40th Victoria.

During this Term, the following gentlemen were called to the Bar; the names are given in the order of merit.

Albert Clements Killam.
Thomas Hodgkin.
Cornelius J. O'Neil.
Francis Beverley Robertson.
Henry Ernest Henderson.
Hamilton Cassels.
Francis Love.
William Wold.
Thomas Caswell.
J. A. Loughheed.

The following gentlemen were called to the Bar under the rules for special cases framed under 39 Victoria, Chap. 3.

George Edmonson.
Frederick W. Colquhoun.
Edward O'Connor.
John Bergin.

The following gentlemen received Certificates of Fitness:

J. H. Madden.
H. Cassels.
J. W. Gordon.
J. Dowdall.
C. J. O'Neil.
T. M. Carthew.
T. J. Decatur.
T. D. Cowper.
A. W. Kirkman.
C. McK. Morrison.
C. Gordon.
F. S. O'Connor.
G. S. Hallen.

And the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:

Graduates.

Charles Augustus Kingston.
John Henry Long.
James J. Craig.
William Fletcher.
Leonard Hartstone.
Patrick Anderson Macdonald.

Junior Class.

Benjamin Franklin Justin.
John T. Guinlan.
John Williams.
Joseph William MacDowell.
Phillip Henry Drayton.
Thomas A. Gorham.
James R. Brown.
George J. Sherry.
D. Henderson.
Angus McR. McKay.
Alexander Carpenter Brakeley.
John Bertram Humphries.
Lauren G. Drew.
Herman Joseph Everts.
Solomon George McGill.
David Johnson Lynch.
Thomas Henry Loscombe.
John Vashon May.
George Moir.
J. H. Macallum.
Hector McKay.
Hugo Schlieper.
David Robertson.
Charles Rankin Gould.
William James Cooper.
Edward Stewart Tisdale.
Francis Melville Wakefield.
Alexander Stewart.
Thomas Miller White.
John Arthur Mowat.
Henry Bogart Dean.
George Robert Knight.
Humphrey Albert L. White.
John Wood.
George Benjamin Douglas.
Alexander Humphrey Macadams.
Hugh Boulton Morphy.
William Henry Brouse.
George J. Gibb.
Frederick E. Redick.
William Mason.
Edward Gurd Porter.
Thomas Robert Foy.
Henry Albert Rowe.
Thomas H. Stinson.
Stewart Masson.
Francis Evans Curtis.
William Stehen.
Robert Taylor.
Henry M. East.
Armour William Ford.

Wm. Martin McDermott.
Charles W—— Phillips.
Wellington Small.
John Clyde Grant.
George Merrick Sinclair.
George Walker Mason.
Edward Albert Foster.
Frank Russell Waddell.
Francis P. Conway.
Henry Dexter.
William T. Easton.
Albert Edward Wilkes.
James Lane.
John Henry Cooke.
Alexander Howden.
Douglas Buchanan.
John Alexander Stewart.
Arthur Mowat.
John McLean.
Robert Cockburn Hays.
William Aird Adair.
Ernest Wilbert Smeresmith.
John Baldwin Hand.
James Barrie.
George Frederick Jeffs.

Articled Clerks.

Noble A. Bartlett
Owen M. Jones.
Eugene Maurice Cole.
Ernest Arthur Hill Langtry.
John Oberlin Edwards.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission as Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects:—

CLASSICS.

Xenophon Anabasis, B. I.; Homer, Iliad, B. I. Cicero, for the Manilian Law; Ovid, Fasti, B. I., vv. 1 300; Virgil, Æneid, B. II., vv. 1-317; Translations from English into Latin; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of quadratic equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; An examination upon "The Lady of the Lake," with special reference to Cantos v. and vi.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar. Translation of simple sentences into French prose. Corneille, Horace, Acts I. and II.

or GERMAN.

A paper on Grammar. Museum, Stumme Liebe Schiller, Lied von der Glocke.

Candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), are required to pass a satisfactory examination in the following subjects:—

Ovid, Fasti, B. I., vv. 1-300,—or
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

A Student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk, (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

All examinations of Students-at-Law or Articled Clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

THOMAS HODGINS, *Chairman.*

Osgoode Hall, Trinity Term, 1876.

Adopted by the Benchers in Convocation August 29, 1876.

DIARY FOR APRIL.

1. SUN..*Easter Sunday.*
2. Mon ..County Court term begins. County Court sitt. (ex-York) for trials without Jury.
5. Thur. .Canada discovered, 1499.
7. Sat. ...County Court term ends.
8. SUN..*Low Sunday.*
9. Mon ..Surrender of Gen. Lee, 1865.
12. Thur. .Bombardment of Fort Sumpter, 1861.
15. SUN..*2nd Sunday after Easter.* Pres. Lincoln assassinated, 1865.
18. Wed ..First newspaper published in America, 1704.
22. SUN..*3rd Sunday after Easter.*
24. Tues..Earl Cathcart, Governor-General, 1846.
27. Fri....Royal Titles Bill passed. Queen created Empress, 1876.
29. SUN..*4th Sunday after Easter.*
30. Mon ..Last day for Assessors to complete rolls.

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THE

Canada Law Journal.

Toronto, April, 1877.

The Court of Appeals of Maryland has recently decided that the act of self-destruction cannot be judicially regarded as proof *per se* of insanity. It is but a fact, together with all the other facts in the case, from which the Court are to determine the testamentary capacity of the testator, not at the time of committing suicide, but at the time of the execution of the will: *McElwee* v. *Ferguson*, 16 Am. Law Reg. 97.

We notice the death of Thomas Lewin, in his 72nd year. As the author of "Lewin on Trusts," his name was very familiar, but, apart from law, he was an antiquarian and scholar of no mean repute. His "Treatise on the Life and Epistles of St. Paul," occupied his attention for forty years. Touching this book, a leading theological critic has classed it among the commentaries which he values most, and which he would advise the student to get at all cost.

Lord Coleridge has boldly denied in a letter to the Home Secretary the right of any member of the House of Commons to call upon him to answer to the House for his conduct as a Judge. This is an end probably of his offence against the anti-poachers, in having stated that "as the law protected the amusements of rich people, they must pay for its enforcement." We can understand and appreciate the idea that was probably passing through his Lordship's mind when he made this remark; it was nevertheless an unfortunate observation from one in his position.

The *Solicitor's Journal* notes the practice henceforth to be followed at the Rolls on motion to vary minutes. Sir George Jessel announced that the only question to be argued was, what was the actual order made: he would not allow the case to be re-argued. The only exceptions were when both parties consented to something being added to the minutes; or, as sometimes happened, when it could not be ascertained what order had been made. In the latter event, the case might be put on the paper to be argued again. This has long been the practice in the Court of Chancery in Ontario.

The *Law Times* again falls foul of the "authorized reports," and suggests the propriety of "something superior to the present sleepy supervision" of them. The writer says:

"In the current part of the Chancery Division reports we find a case of *Morgan* v. *Elford*. The report extends from p. 352 to p. 388—thirty-six pages! Nineteen of those pages are devoted to a judgment of Vice-Chancellor Malins setting out elaborately the evidence upon which he came to the conclusion that the defendant had been guilty of fraud. On this very evidence the Court of Appeal came to the conclusion that the defendant had done nothing inconsistent with the nicest sense of honour or with the most scrupulous integrity! The legal principle upon which the Vice-Chancellor founded his judgment was not noticed by the Court of Appeal, and this report, therefore, is a report of conflicting views on questions of fact, and is a gross imposition upon subscribers—as gross as the famous Consolidated Digest."

One result of the English Judicature Acts has been to increase enormously the amount of business in the Court of Chancery, so that the accumulation of work has occasioned what is commonly spoken of as "The block in the Chancery Division." The improvement in the procedure is credited with giving this additional impulse to litigation. Besides this, the mode of trial involving the reception of *viva voce* evidence before the Judge, considerably lengthens those parts of the case which require judicial interposition. This has also been noticed in Ontario, where the present practice of examining the parties both at law and in equity, has occasioned an unusual consumption of time in the trial and hearing of causes. It is said that the remedy to be applied in England, is an increase of judicial power, by the appointment of a new Judge to be attached to the Chancery Division.

We learn from the *Albany Law Journal* that New Jersey means to put an end to railway employee strikes, its legislature having passed a bill making it a misdemeanor for any locomotive engineer in furtherance of a strike to leave his engine at any other point than the schedule destination of the train, and also making it a misdemeanor for any railway employee, for the purpose of lending assistance to a strike, to refuse to aid in moving trains, or for any person to obstruct the operation of trains, or do other acts for a like purpose.

Mr. Blake's bill now before the House of Commons, provides that whosoever, being under a contract of service with a railway company carrying mails or passengers, wilfully and maliciously breaks any such contract, believing that the probable consequences will be to delay or prevent the running of trains, shall be subject to fine or imprisonment. The object aimed at is identical, and the necessity for some such provision is manifest.

In a case reported in the London *Times* of *Republic of Costa Rica* v. *Erlanger*, Malins, V.C., held, that a solicitor while engaged in the execution of his duty in the conduct of a cause, as a solicitor there-

in, is entitled to the protection of the Court as against the violence and abusive language of another solicitor. An order for the production of documents had been made, and it was directed that the documents should be inspected at the office of the defendant's solicitor. However, an order for security for costs was taken out, and before security was given, the plaintiff's solicitor wished to proceed with the inspection. This was objected to, and then a draft bond for security was prepared by the plaintiff's solicitor, and left for approval with the defendant's solicitor. Afterwards, the plaintiff's solicitor called at the office of the other solicitor for this draft of bond, when he was assaulted and called a scoundrel. The Vice-Chancellor held, that this was a contempt of Court, and required the offending solicitor to make an ample apology, and pay the costs of the application. But, upon appeal, this decision was reversed.

NEW LAW BOOKS.

The Revised Statutes of Ontario, which will be issued as soon as the incorporation of the Acts of the last session is completed, will doubtless be followed by an increase in the legal literature of the Province, and will certainly demand new editions of some of our standard works.

Mr. Leith, we understand, is likely to issue a new work on the law of Real Property, or a new edition of his Blackstone's Commentaries. At the request of the Chief Justice of Ontario, Mr. Frank Joseph, who is now assisting Mr. Christopher Robinson in the new Digest of Ontario Reports, has undertaken to edit new editions of Mr. Harrison's invaluable works, the Common Law Procedure Act, and the Municipal Manual. It is proposed to include in the former the Law Reform Act, the Administration of Justice Act and the Rules of Court, so as to include in one volume the practical procedure of the Common Law Courts. The Municipal Manual will be similar in character to the last edition, but will require to be thoroughly recast. It will be issued almost immediately after the issue of the Revised Statutes, the work being now in course of preparation from advance sheets of that compilation.

Mr. O'Brien is already at work on a new edition of his Division Court Manual, the first having been for some years out of print. This book will supply a want felt, not only by the officers of the Division Courts and those not of the long robe who are permitted to practice therein, but also by professional men whose services are now rendered more imperatively necessary by reason of the extended jurisdiction of these Courts. The growing importance of these inferior tribunals imperatively demands a work which will guide to a uniformity in procedure as well as decisions, and so increase the usefulness of these courts, to which a large portion of all classes of the community must continually resort.

We are also glad to be able to announce the issue of the tenth number of Messrs. Robinson & Joseph's Digest. It includes the titles of "Justice of the Peace" and "Landlord and Tenant," and brings the work down to the end of "Legacy."

PRINCIPLES OF JUDICIAL DECISION.

The Irish Lord Justice Christian has been lately overhauling a judgment of the Vice-Chancellor in a most *unchristian* style. The whole attack is a very brilliant piece of rhetoric, but entirely indefensible as a judicial deliverance. Some of his observations, however, are of general application, and not without meaning in many cases that have been decided in other Courts than those of Ireland. He said that there were two schools of

construction with which the Courts were familiar—namely, the very liberal and the very strict one, the spirit and the letter. Bentham alluded to the two-fold interpretation on the "double fountain principle," the effect of which was to make the Judge almost the master of every cause that came before him. Appended to the passage was a quotation from Homer, in the Greek, with Pope's translation of it, as follows:—

> "Two urns by Jove's high throne have ever stood,
> The source of evil one, and one of good;
> From thence the cup of mortal life he fills,
> Blessings to these, to those distributes ills."

In the present case, he went on to say, one might imagine the Vice-Chancellor seated on his small Olympus, with two urns before him, on one of which was inscribed 'laxness,' and on the other 'literalness,' and dipping his hand into the one and into the other, as he came to deal with different inquiries.

The well-known author, Mr. J. W. Smith, who is now a County Court Judge in England, has also been vexing his soul with the incongruities of judicial decision. He was moved to give vent and voice to his feelings, as he observed the manner in which the judgments of the High Court of Justice are week by week overruled by the Court of Appeal, and the Court of Appeal itself in turn overruled by a higher tribunal. His views were thus stated: "Equally eminent judges have been, and are governed by different systems or theories of judicial decision, leading to opposite results: the one mainly proceeding on technical refinements, the other on principles of natural justice, common sense, and public policy; the one deciding on general rules or principles, the other looking to the exceptive circumstances of each case as much as to general rules or principles. The adoption of the former system by some judges has led to endless uncertainty, frequent litigation, both original and appellate, incalculable expense and vexation, and the grossest injustice and contravention of public policy. And it has been the prolific source of a mass of refined trash and learned rubbish, which strains the brains, occupies the public time, and exhausts the bodily and mental powers of the judges to no purpose but to defeat moral right and sound expediency." What he proposes as the remedy would be of rather equivocal benefit. He suggests that a statute should be passed, providing that, subject to any plain enactment or plain agreement to the contrary, and subject to the established rules of law, where an exception to such rules is not called for by the circumstances, all cases in litigation, other than cases of construction, shall in the discretion and to the best of the judgment of the Judge deciding the same, be decided as far as may be, according to justice, moral right, and public policy.

Mr. Smith's proposed legislation recalls one of the most pungent of Lord-Mansfield's sarcasms, as commemorated in the pages of Woolrych. Serjeant Sayer went the circuit for some Judge who was indisposed. Afterwards, he was imprudent enough to move, as counsel, to have a new trial of a cause heard before himself, for a misdirection by the Judge. Lord Mansfield said: "Brother Sayer, there is an Act of Parliament, which in such a matter as was before you, gave you discretion to act as you thought right." "No, my Lord," said the Serjeant, "I had no discretion." "You may be right, Brother," replied Lord Mansfield, "for I am afraid even an Act of Parliament could not give you discretion." As pointed out in some appropriate sentences of the admirable judgment of Mr. Justice Moss in *Re Stratford and Perth*, 38 U.C. Q.B. 157, "the discretion which the Court should exercise, is not one founded upon its

notions of what would accord with natural justice, or harmonize with the requirements of a perfect system of ethics in the particular case, but that sound judicial discretion, which acts upon well defined rules of general application. It will hardly suffice to say that this remedy [the application before the Court was for a *mandamus*] is to be granted or withheld *secundum discretionem boni viri*, unless appellate Judges are to be deemed gifted with superior goodness. I think that in this case, as suggested by Sir Joseph Jekyll, with reference to the jurisdiction of Chancery, we must go further and ask the question: *Vir bonus est quis?* And I see no objection to the answer given of old: *Qui consulta patrum, qui leges juraque servat.*"

The *Solicitors' Journal*, in a very good piece of burlesque, advocates the view that Mr. Smith's statute would require a supplementary clause to make it work properly, as follows: "All cases in litigation shall be decided in the following manner, that is to say:—There shall be furnished, for the use of each Court, one or more small discs of bronze; such discs shall be provided by Her Majesty's Mint, and shall bear on the one side the image of Her Most Gracious Majesty, and on the other side a sitting image or figure, representing Britannia. When a case shall be called, one of the said discs shall be placed before the Judge by the Registrar, and the said Judge, taking the same between his thumb and forefinger, shall thereupon direct that the said image of Her Majesty shall represent, for the purposes of the case, the arguments for the plaintiff, and the said image of Britannia the arguments for the defendant, and shall forthwith to the best of his ability, toss the said disc. If upon such tossing, the said disc shall so descend that the said image of Her Majesty shall remain uppermost, judgment shall be given in favour of the plaintiff; if otherwise, for the defendant."

The uncertainties of decision arising from the supremacy of one or other of the conflicting principles we have mentioned, seem inseparable from the system of English law as now administered. It is a part of the imperfection found in all mundane concerns, and need not be specially identified with the glorious uncertainty of the law. As pointed out by a recent author, rules of law only mean that the Courts have taken a particular view of a certain set of facts, and will do so again if similar facts arise. This process is inevitably subject to a two-fold danger: a strong Judge will be more likely to distinguish cases, he will look upon precedent as a guide, and not as a master. A Judge of a less independent spirit will dwell more upon resemblances, and will be more anxious to shelter himself under authority. The inclination of the one to adapt the law to the changing conditions of life, has the accompanying disadvantage of unsettling it,—while the other tends to make the law antiquated, though he leaves it certain.

The English *Law Journal* relates at length the sale of Serjeants' Inn, Chancery Lane, by auction. The 'Hall' is described as comprising a lofty dining-hall, having five richly stained glass windows, a coffee-room, a lofty chapel, having three richly stained glass windows, and robing-rooms for judges and serjeants. The property was stated to have a frontage to Chancery Lane of 130 ft., and, being in close proximity to the new Law Courts, offered unusual facilities for the erection of an institution or club-house, &c. After some spirited bidding the property was knocked down to Mr. Serjeant Cox for £57,100.

SELECTIONS.

THE FRANCONIA CASE.

Britannia does not rule the waves: *per* Cockburn, C. J., Kelley, C. B., Bramwell, B., Lush, J., Pollock, B., Field, J., and Sir R. Phillimore. Our readers, we trust, will entertain no feeling of alarm at the above rather sensational statement. The Channel Fleet is, we believe, still afloat; the "Thunderer" has not struck her flag to the Russian admiral; and to the best of our belief the Lords of the Admiralty will be able to give a most satisfactory account to Parliament of the state of the navy. Notwithstanding this, the first sentence of this article is strictly true. The law on the subject is laid down very clearly in the great case of *The Queen* v. *Keyn*, better known as the case of the "Franconia," which will be found reported at great length in the current number of *The Law Journal Reports* (46 L. J. M. C. 17). It seems to us to be a matter of congratulation to the whole country that a question, containing within it elements so calculated to provoke a hostile feeling between two independent powers, should have been decided in so peaceable a manner by a tribunal which must command universal respect. The facts of the case out of which the dispute arose were shortly as follows:—The "Franconia" was a German vessel carrying the German flag. She sailed from Hamburg, with the prisoner, who was a German, in command, and a German crew, but with a French pilot. She was carrying a mail from Hamburg to St. Thomas, in the West Indies, and put into Grimsby to take on board an English pilot, whose duty it was to conduct her down Channel as far as the South Sand Light, after which she would proceed to and touch at Havre, where she would land the English pilot and the French pilot, whose duty it was to conduct her from off Dungeness to Havre, and thence go to St. Thomas. When a mile and and nine-tenths of a mile S.S.E. from Dover Pier Head, and two and a half miles from Dover Beach, she came in collision with an English steamer, outward bound for Bombay. The "Franconia" was the overtaking vessel, and, according to the rule of the road at sea, was bound to give way. She, accordingly, was clearly in the wrong in the collision. After this event, however, the "Franconia," in defiance of all laws of humanity, as well as those of every civilized State, proceeded away from the scene of the accident, leaving the passengers and crew of the "Strathclyde" to their fate. The result was a lamentable loss of life, for which the prisoner was brought to trial at the Central Criminal Court, and found guilty of manslaughter.

The question as to the jurisdiction of this Court was reserved for the Court for Crown Cases Reserved, where it was twice argued—the second time before fourteen judges, one of whom (the late Mr. Justice Archibald) died during the period the case was before the Court. The question resolved itself into this, whether the accused, though he might be amenable to the law of his own country, was not capable of being tried and punished by the law of England? The counsel for the Crown met the challenge to the jurisdiction by the prisoner in the following way:—First, they contended that although the occurrence on which the charge was founded took place on the high seas—in this sense, that the place in which it happened was not within the body of a county—it occured within three miles of the English Coast; that by the law of nations the sea for a space of three miles from the coast is part of the territory of the county to which the coast belongs; that, consequently, the "Franconia," at the time the offence was committed, was in English waters, and those on board were, therefore, subject to English law. Second, that, although the negligence of which the accused was guilty occurred on board a foreign vessel, the death occasioned by such negligence took place on board a British vessel, and that as a British vessel is in point of law to be considered British territory, the offence having been consummated by the death of the deceased in a British ship, must be considered as having been committed in British territory. As to the point of a foreigner being responsible for a crime committed on the high seas on board a foreign ship by a foreigner, it was admitted that he was not answerable to English law. Story (Conflict of Laws, sec. 539) has laid down the law accurately on this subject as follows:—"No sovereignty can ex-

tend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exercise of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals." The same principle was decided by Dr. Lushington in the "Zollverein," 1 Swabey Adm. Rep. 96. It was necessary for the Crown to establish that the jurisdiction of the Admiralty, now vested in the Central Criminal Court, would extend to such a case as the present. On this point the law is admirably summed up in a passage in the judgment of Chief Justice Cockburn—"Whatever of the sea lies within the body of a county is within the jurisdiction of the Common Law; whatever does not, belonged formerly to that of the Admiralty, and now belongs to the Courts to which the jurisdiction of the Admiral has been transferred by statute, while in the estuaries or mouths of great rivers below the bridges in the matter of murder and mayhem, the jurisdiction is concurrent. On the shore of the outer sea the body of the county extends so far as the land is uncovered by water. And so rigorous has been the line of demarcation between the two jurisdictions that, as regards the shore between high and low water-mark, the jurisdiction has been divided between the Admiralty and the Common Law according to the state of the tide. Such was the law in the time of Lord Coke, and such it is still."

The question now had to be decided as to how far the Admiralty jurisdiction extended. Several ancient writers contended that the King's sovereignty extended over a large tract of water. The most extravagant of these assertions was that of Sir Leoline Jenkins, who seems to have supposed that the authority of the King of England extended beyond the four seas to the Atlantic and the Mediterranean. Such a contention at the present day is impracticable and absurd. No modern authority of any eminence has ventured to assert it, and the efforts of modern jurists have been directed to define the zone around the coast over which the English Courts can claim jurisdiction. The mind gets confused on reading the vast amount of somewhat barbarous latin in which the lawyers of Europe have endeavoured to define the difference between *mare liberum* and *mare clausum*. The general result would, however, seem to be that the three-mile zone, or the extent to which an ordinary cannon shot is supposed to reach, is the limit of the authority of the territorial dominion.

The decision of the question, if it be correct, is founded on the maxim of Bynkershoek—"*potestas finitur ubi finitur armorum vis.*" From this proposition Vattel draws the deduction that a vessel taken under the cannon of a neutral fortress is not a good prize. Bynkershoek's rule may, we think, be taken broadly as established; the question remains as to what is the nature of this sovereignty? Distinctions have been drawn by several writers on international law as to the distinction between *commorant* and *passing* ships, and in our opinion, such a line is most reasonably to be drawn. However, in the present case, no such question arose. The "Franconia" was, most unquestionably, merely a foreigner navigating English waters, and, as such, she was not, in the opinion of the learned Judges who formed the majority of the Court, liable to the laws of England.

The reasons for this judgment are scattered over about 80 pages of a closely printed report, but we think the *ratio decidendi* is perfectly given by the Lord Chief Justice, who declares that to sustain the indictment, the portion of sea in which the offence was committed must still be considered as part of the high seas, and as such under the jurisdiction of the admiral. But the admiral never had jurisdiction over foreign ships on the high seas. How, when exercising the functions of a British judge, can he, or those acting in substitution for him, assume a jurisdiction which heretofore he did not possess, unless authorized by State? The general result of the case was that by a majority of one—seven judges to six—the conviction was quashed on this point of jurisdiction. Some of the dissentient judges based their judgment on what we take the liberty to term the hair-splitting distinction, that the death having taken place on board a British ship, the offence was within British jurisdiction. To this an adequate answer will be found in the judgment of Sir R. Phillimore, page 18:—"It appears

the prisoner had no intention to injure the 'Strathclyde,' or any person on board of her. He never left the deck of his own ship, nor did he send any missile from it to the other ship; neither in will or in deed can he be considered to have been on board the British vessel. He can no more be considered by intendment of law to have been on board the British vessel than he would have been if his bad navigation had caused the 'Strathclyde' to impale herself upon the 'Franconia,' and so to sink." We have given the above necessarily short sketch of this important case; we decline to say we agree with the majority, but certainly the main basis on which we might be disposed to differ, is the broad point of the jurisdiction within the three miles zone, not the point of the offence having been committed on an English ship, which, in our opinion, it certainly was not. As a treatise on international law, we advise our readers carefully to consider the report. It may make some demands on their time, but they will be amply repaid by the consideration of a most masterly series of essays, for such in truth are the judgments delivered on this highly difficult and interesting subject.—*Irish Law Times.*

THE NEW CHIEF JUSTICE OF IRELAND.

The appointment of the Right Hon. George Augustus Chichester May to the high office of Lord Chief Justice of Ireland is now *fait accompli*, and has received the cordial approval of the legal profession as well as of the general public. Mr. May, who is now in the 60th year of his age, was educated at Cambridge, where his academic career was highly distinguished. He was Bell's University scholar, and took a double first-class, having been third in the Classical Tripos, and also a Wrangler. He was called to the Irish Bar in Hilary Term, 1844, and was made a Queen's Counsel in 1858. Popular at the Bar, eminently judicial in his cast of mind, intellectual in culture, and gifted with great powers of application, the conscientious and upright lawyer who is now the Lord Chief Justice of Ireland well deserved that high promotion, and it would have indeed been difficult to make a selection more wise and fitting.—*Irish Law Times.*

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

Wiley v. Smith.

From Q.B.] [Feb. 20.

Stoppage in transitu—Goods bonded in consignee's name.

The plaintiffs, merchants in New York, sold E. B. & Co. at Toronto, 250 barrels of currants on credit, and consigned the same to them in bonds. A bill of lading thereof was duly received by E. B. & Co., who paid the freight thereon, and gave their acceptances for the price of the said goods, as well as for the cartage and the American bonding charges. On the arrival of the goods, they were entered and bonded in the consignees' name, and placed in one of the Customs bonded warehouses, subject to the payment of the duties. E. B. & Co. sold and delivered 150 barrels of the said quantity, and the remaining 100 barrels were bonded under 31 Vict. cap. 6, subject to the duty, in a portion of E. B. & Co.'s warehouse. Before the acceptances matured, and while the goods remained in bond, E. B. & Co. became insolvent.

The Court (Burton, Patterson, Moss, J.J.A., and Proudfoot, V.C.,) *held*, reversing the judgment of the Queen's Bench, that the *transitus* was at an end, and that the right of stoppage *in transitu* had ceased.

Foster and *J. B. Clarke* for the appellant.

O'Donohoe, with him *Meek*, for the respondent.

Appeal allowed.

Trumpour v. Taylor.

From Q.B.] [Feb. 20.

33 *Vict. cap.* 7, *sec.* 6.

Held, (Patterson, Moss, J.J.A., Galt, J., and Blake, V.C.,) that there is no appeal to the

Court of Appeal where a verdict is entered in the Court below, under 33 Vict. cap. 7, sec. 6, on a matter of discretion only.

M. C. Cameron, Q.C., for the appellant.

J. K. Kerr, Q.C., with him *W. G. P. Cassels*, for the respondent.

Appeal dismissed.

Re McCrae.

From C.C. Stormont.] [Feb. 27.

Insolvency—Deed of composition and discharge.

Where G. & M., creditors, on the application of the insolvent, refused to execute a deed of composition and discharge, but subsequently consented to do so upon being called upon by the assignee—who, as an inducement, gave his own note to cover costs, which they had incurred in endeavoring to recover the claim.

The Court (Burton, J.A.,) *held*, affirming the decision of Judge in insolvency that the deed was void, even although the action of the assignee was unauthorized by the insolvent.

Bethune, Q.C., for the appellant.

S. Richards, Q.C., for the respondent.

In re McMillan and the Joseph Hall Manufacturing Company.

From C.C. Ontario.] [March 6.

Insolvency deed of composition and discharge—Unliquidated damages.

M. brought an action on a breach of warranty of a reaping machine, but suspended proceedings on hearing of the insolvency of the defendant.

After the defendant had procured the confirmation of a deed of composition executed by the majority in number and value of the creditors, M. proceeded with the action and obtained a verdict upon which judgment was entered and execution issued. After the recovery of the judgment, the insolvents filed a supplementary list of creditors, and gave notice thereof to the plaintiff, and tendered the compositions provided by the deed of composition and discharge, which M. refused to accept.

The Court (Burton, J.A.,) *held*, reversing the decision of the Judge in insolvency, that the judgment was not affected by the deed of composition and discharge, and the order restraining the execution was therefore vacated.

Dunbar and *Thomson* for the appellants.

Oster for the respondent.

Appeal allowed.

McLean v. Dun et al.

From Q.B.] [March 17.

Trade Protection Societies.

The defendants, who carried on the business of a Trade Protection Society, in consideration of a yearly subscription, undertook to procure and furnish the plaintiff, a merchant in Toronto, to the best of their ability, with information of the mercantile standing and credit of the plaintiff's customers among the merchants' traders and manufacturers throughout the United States and Canada, in the communities wherein they respectively resided, for the purpose of aiding the plaintiff in determining the propriety of giving credit. On the 14th June, 1875, the plaintiff sent his clerk to the defendants to ascertain the mercantile standing and credit of one W., residing and doing business in Toronto, who had applied to him to purchase goods on credit. The defendant's clerk read out of a book to the plaintiff's clerk that W. had stock to about $10,000, and $5,000 or $6,000 in his business, and claimed to be worth $7,000; that his character and habits were good; that he was doing a fair trade; and that his credit was good locally. The plaintiff, relying on this information and without making any further inquiries, about twelve days afterwards sold to W. goods to the value of $500 on credit. W. was really insolvent at the time the report was made, and on the 8th July following, absconded, without paying the plaintiff. The jury found that the defendants did not furnish the information to the best of their ability, and that the plaintiff did not act imprudently in not making inquiries, though living in the same place with W.

The Court (Burton, Patterson, J.J.A., and Blake, V.C.,—Hagarty, C.J.C.P., dissenting,) *held*, reversing the judgment of the Queen's Bench, that the defendants were not liable for the loss which the plaintiff had sustained by acting on the representation, it not being in writing and signed by them under C.S. U.C. 44, sec. 10.

Held, also, that the fact that the representation was made in pursuance of a contract did not prevent the application of the statute.

M. C. Cameron, Q.C., *C. Robinson*, Q.C., and *J. A. Boyd*, Q.C., for the appellant.

Bethune, Q.C., with him *Clarke*, for the respondent.

Appeal allowed.

CHANCERY.

Cockburn v. Eager.

Proudfoot, V.C.] [January 31.

Injunction at instance of defendants—Riparian rights—Trespasser.

In a suit brought to have boundaries declared, the defendants claimed the right to an injunction to restrain the plaintiff from retaining the use of a road along a portion of the shore of Muskoka Bay. It appeared that the road in question was of great public utility and benefit; that the defendants were not riparian proprietors, there being a road allowance laid out along the shore between their lands and the waters of the bay; that the defendants had built their mills, one partly in the waters of the bay and partly on the public highway, the other in the navigable waters of the bay.

Held, that the defendants were to be treated as plaintiffs, seeking relief by bill, and that being themselves trespassers (following *Giles* v. *Gambpell*, 19 Grant 226), they were not entitled to any relief against the plaintiff.

Suter v. Merchants' Bank.

Proudfoot, V. C.] [Feb. 21.

Manufacturer, advances to—Warehouseman's receipts—Insolvency—Unjust preference—Vagueness of agreement—Lien on receipts when issued.

In May, 1874, A., a manufacturer, open an account with a bank, representing himself as being in good circumstances, with a capital of $20,000 over all his liabilities, which was believed by C., the bank agent, who thought that he was doing a flourishing business. A. promised to keep C. always well supplied with collaterals for any accommodation afforded him. In December, 1875, A. applied to C. for assistance, and proposed that he should warehouse his goods as manufactured, and pledge the receipts of the warehouseman to the bank for advances to be made to him, which proposal was acceded to by C. Advances were accordingly made, for which receipts were deposited with C. on the 19th of January, 25th of January, 1st of February, and 7th of February. On the 26th of February, A., in compliance with a demand by some of his creditors, executed an assignment in insolvency.

On a bill filed to impeach these transactions as an unjust preference, the Court being satisfied that they all took place in good faith, and not in the contemplation of insolvency, *held* that the bank were entitled to hold their lien on such of the receipts as were so deposited more than thirty days before the assignment in insolvency; but, in respect of such of them as were deposited within the thirty days, the bank could not claim any lien or priority.

Held, also, that the same rule was applicable to promissory notes deposited with the bank as collateral security.

The promise, however, to keep C. well supplied with collaterals was of too vague and general a character to entitle the bank to retain any lien. But where advances were to be made on goods manufactured remaining unsold, (without specifying any quantity) and C. was to judge of the amount of the advance to be so made:

Held, that this agreement was not so vague or uncertain as to prevent the bank obtaining security for advances.

The Dominion Act, 34 Vict., cap. 5, sec. 47, enables a party making advances to a manufacturer to stipulate for obtaining a lien on warehouse receipts, to be subsequently granted to the manufacturer.

It is incumbent on a party, seeking to impeach, as an unjust preference, a transaction between a debtor and his creditor occurring more than 30 days before insolvency, to prove that such transaction took place in contemplation of insolvency.

A. owned a barley mill which he was endeavoring to sell to one T., whose notes he was to accept in payment, and in December, 1875, he arranged with C. that these notes were to be handed over in security for all his own paper, then under discount. Subsequently, and on the 7th of February, 1876, the sale to T. having fallen through, he executed a memorandum in writing transferring to C. "as collateral security against paper discounted for me, my right, title and interest in a barley mill * * * keeping the privilege of disposing of the same and handing to you the promissory notes of the" purchaser.

Held, that this was not an unjust preference; that the bank having made advances on the faith of having the proceeds of the sale handed over, it was no extension of their security, on the sale falling through, to obtain an assignment of the mill itself.

Fuller v. Macklem.

Chancellor.] [March 16.

Construction of will.

A testator left legacies to his several nephews and nieces to be paid one year after his decease, and which he directed his trustees to keep invested during their minorities "in good and safe securities, drawing interest, for the benefit of the said legatees respectively, and to pay over or assign to them along with the principal moneys the accumulated interest or dividends as they severally attain their majority." In a subsequent part of his will, the testator directed that "whereas in my wisdom and discretion I have now seen fit to direct and declare that my nephew, S. M., shall not come into possession of his legacies or bequests until he has attained the age of twenty-three years, and being desirous that provision shall be made for his support and maintenance after he attains the age of twenty-one years, and until he arrives at the age of twenty-three years, I will and direct that my executors shall pay him, after he so attains the age of twenty-one years, and until he attains the age of twenty-three years, the annual interest, dividend and income of the sum of twenty-five thousand pounds which they are to invest and keep invested for that purpose."

Held, that S. M. was entitled to interest on his legacy from one year after the death of the testator until his coming of age.

Smith v. Rose.

Proudfoot, V. C.] [March 28.

Administration—Payments by administrator.

S. assigned to the defendant certain promissory notes for his sole and only use, except such as must be used in liquidation of all necessary expenses in connection with his board and funeral expenses, and by his will appointed the defendant his executor. In taking the accounts in an administration suit, one of the local masters refused to allow the defendant the expenses of taking out probate of the will, of advertising for creditors, of medicine and medical attendance for the testator, and of a grave stone, as having been sufficiently compensated for by the notes.

Held, on appeal, that he was entitled to be allowed the amounts in passing his accounts.

Fulton v. Fulton.

Proudfoot, V. C.] [March 28.

Mortmain Acts.

Where land is specifically devised, charged with a void bequest, the charge sinks for the benefit of the specific devisee; therefore where a testator devised his real estate, "consisting of * * * to A. F., eldest son of * * to exercise ownership over said lots during his natural life, he shall not sell or alienate any or either of them, but they shall remain an inheritance unincumbered to his legal heir, whether male or female, for all time to come. I bequeath to A. F., the aforementioned heir, the shop on the church property with all its goods and contents." As a charge upon this property he left $4000 to the English Church of Cornwall.

Held, that so far as this was charged on land, freehold or leasehold, the bequest was void; so far as charged on personalty it was valid and would be apportioned *pro rata* between the realty and personalty; that A. F. was entitled to hold the property subject only to such proportion of the legacy as was properly applicable to the personalty.

COMMON LAW CHAMBERS.

McRoberts v. Hamilton.

Mr. Dalton.] [January 26.

Sheriff's fees—Poundage—Satisfaction of judgment—Amount.

Held, that when, after seizure by a sheriff under an execution, the execution is settled between the parties by the taking of secured promissory notes from the defendant, the judgment is satisfied so as to entitle the sheriff to poundage under 27-28 Vict. cap. 28, although the execution remains in the sheriff's hands to be enforced if the notes should not be paid at maturity.

Mr. Marsh (Muloch and Campbell) for sheriff.
H. J. Scott, for plaintiff.

Marsh v. Donovan.

Mr. Dalton, Galt, J.] [February 6.

Trespass to lands—Description—Particulars.

An action was brought for trespass to lands, a count for trespass to goods and for trover, being also added.

Held, that the defendant was entitled to particulars as to the locality of the acts of trespass complained of.

F. Osler, for plaintiff.

H. J. Scott, contra.

Erratum.—At p. 86 ante, under *Wood* v. *McAlpine* for "Galt, J." read "Proudfoot, V.C." And under *McArthur* v. *Smith*, for "From C. C. Wentworth," read "From C. C. Victoria."

CANADA REPORTS.

ONTARIO.

IN THE COUNTY COURT OF THE COUNTY OF ELGIN.

Between Daniel Hanvey, *Judgment creditor*, James Stanton, *Judgment debtor*, and The Corporation of the County of Elgin, *Garnishees*.

Attachment of debts—Practice—Motion by Judgment debtor to set aside order—Garnishing salary of Clerk of Peace.

Horton for the judgment creditor.

Defendant the judgment debtor in person.

The garnishees did not appear.

The facts of the case fully appear in the judgment of

Hughes, Co. J.—The judgment debtor is Clerk of the Peace and County Crown Attorney of the County of Elgin, remunerated by fees prescribed by law, for which he renders accounts for audit to a Board of three persons appointed for the purpose, one of whom is the County Judge, and the other two are nominees of the County Council, under stat. of Ontario 33 Vict. cap. 8, and Con. Stat. U.C. cap 121.

There are various statutes under which he is entitled to fees, such as the Jurors Act and others, whereby the amount is made payable from the county funds without reimbursement, in others certain specific fees are refunded to the county treasury by the Province; but in all, the amounts are considered to be primarily payable out of county funds, whether or not the county treasury is to be reimbursed, either partly or wholly out of the consolidated revenue fund of the Province; the Government paying nothing directly to the judgment debtor, either by way of fees or salary.

All accounts and demands of officers connected with the administration of Justice in the counties are to be preferred against the county subject to the approval of the Board to which I have alluded, 32 Vict. cap. 6, sec. 9; 33 Vict. cap. 8, sec. 1.

All orders or cheques of the Board (except for the payment of constables fees or services rendered during the sitting of the Courts) are to express the Act (if any), under which the expenditure is authorized (C.S. U.C. cap. 121, sec 3). It is to be inferred from the foregoing, and from what follows, although it is not expressly enacted, that all sums audited by the Board are to be paid by the treasurer out of county funds, on cheques or orders to be issued by them in favor of claimants.

It is enacted by the 5th section of C.S. U.C. cap. 121, that except for *debts actually due by a county*—the Board of Audit shall not give an order or cheque for the payment of any sum of money, unless it appers by the Treasurer's accounts that there are sufficient funds in his hands to meet the payment of such order. If any such order be made contrary to these provisions, the person or persons in whose favor such order has been made may recover the same against the Board of Audit, or such of the members as sanctioned such order in an action to be brought for that purpose, as for so much money had and received for the plaintiff's use and benefit. Then the Treasurer is without further order to pay the amount of the fees which are payable out of county funds when duly audited by the Board in an order prescribed and in preference to all other charges, unless otherwise provided by law, (after the expense of levying, collecting and managing the rates and taxes imposed on the county are paid), that is to say:

Firstly, All sums of money payable to the sheriff, coroner, gaoler, surgeon of the county gaol, or to any other officer or person for the support, care or safe keeping of the prisoners in the county gaol, or for the repairing and maintaining of the court-house or gaol.

Secondly, The accounts of public officers and officers of the Court of General Sessions of the Peace.

Thirdly, All sums of money payable for any other purpose whatever connected with the administration of justice within the county.

Fourthly, All other sums of money allowed by the Board in the order in which the same are passed.

The foregoing analysis is what practice and procedure under the statutes and legal decisions on the subject of defraying the expenses of the administration of justice seem to have brought about—but which a strict logical reading of the various Acts of Parliament might controvert. It is under this state of the law, and the facts which follow that the primary creditor insists that a debt is due by the garnishees to the primary debtors which is liable to attachment under the garnishee clauses of the C. L. P. Act. Without any previous examination of the judgment debtor before a Judge, the judgment creditor on the 16th December, 1876, upon affidavit setting forth the usual facts, and that the garnishees were indebted to the judgment debtor in $190.59, or thereabouts, as he was "informed and believed" (the affidavit does not explain upon what cause) obtained an order attaching "all debts due and accruing due from the garnishees to the judgment debtor, to answer the judgment due by the judgment debtor to the judgment creditor."

On the 10th January, 1877, the judgment debtor made application in Chambers upon affidavits of himself and the Treasurer of the county, setting forth some of the foregoing facts, and those which follow for a summons to set aside the foregoing attaching order: alleging that all moneys due to the judgment debtor at the then last audit, which was in October last, had been paid to the judgment debtor; that there had been no audit since October last; that there was no debt due or accruing due to the judgment debtor by the garnishees; that the order had been served upon the County Treasurer; and that such service caused serious inconvenience to the judgment debtor in his transactions with the Treasurer. Both these affidavits directly controvert the most material allegation upon which the attaching order was issued, for they both distinctly deny that there was a debt existing as due or accruing due from the Municipality to the judgment debtor at the time the attaching order was made:

1. To this summons the counsel for the judgment creditor presented as preliminary objections,—first that he should have been served with copies of the affidavits upon which the summons was granted.

2. That the application not being made by the garnishees, this is not a case in which the attaching order can be set aside on the ground of the non-existence of a debt due to the judgment debtor.

3. That the attaching order cannot be set aside at the instance of the garnishees, much less of the judgment debtor on a summary application.

4. That the judgment debtor has no *locus standi* in this matter, that if the existence of a legal debt be disputed it can only be tried by jury, under a writ, in the way provided for in 197th sec. of the C. L. P. Act, and not on a summary application to a Judge in Chambers or by the Court itself.

1. I may say, with reference to the first of these objections, supposing it were tenable under any circumstances, I know nothing whatever, either of a necessity for serving copies of the affidavits, or that it either was or was not done, so that objection falls to the ground for want of proof.

2. I am to decide whether or not the judgment debtor has a *locus standi* on an application like this; whether he had *a right* in fact and law to make it; for this is his application and is not that of the garnishees.

3. If I consider that the judgment debtor might legally or justly make this application, and assert a right in his own behalf, I am to decide whether or not the questions can be disposed of in a summary way—and if so, then whether or not there was a debt attachable under the C. L. P. Act, in the hands of the garnishees at the time the attaching order was made; it being conceded that the alleged debt consists exclusively of the statutory claim for fees payable to the judgment debtor by the garnishees for services rendered by him as Clerk of the Peace and County Crown Attorney in his public capacity as an officer appointed by the Crown, and not in any sense as the servant of the garnishees or by their employment or request.

4. In cases not expressly provided for by law, the practice and proceedings in the County Courts are to be regulated by and conform to that of the Superior Courts of Common Law, and this practice applies and extends to the County Courts. The Judges of the County Courts have power to issue summonses and make orders in all matters of practice in like manner and on like principles and grounds, and to the same extent as the Judges of the Superior Courts have power.

I do not think it necessary to go very largely into the consideration of this point, because I find that acting under analogous statutes concerning the attachment of debts under the C. L. P. Act, the Courts as well as the Judges in Chambers, both in England and this Province, have entertained summary applications to set

aside attaching orders; sometimes at the instance of judgment debtors and garnishees; in others at the instance of the solicitors claiming liens for costs of judgments against garnishees, and no question has been entertained subversive of the right of a Judge or of the Court to interfere summarily in cases, where no doubt, whatever was left as to the existence of a debt. *Ferguson* v. *Carman*, 26 U.C. Q.B. 26; *Bank of U.C.* v. *Wallace Adair*, garnishee, 2 Prac. Rep. 352; *Seymour* v. *Corporation of Brecon*, 5 H. & N. 961, are authoritative precedents for me; and there are numerous other cases on this point. See also *Robertson* v. *Grant*, 3 Chy. Ch. Rep. 331; *Wise* v. *Berkenshaw*, 2 L.T. N.S. 223; *Newman* v. *Rook*, 4 C.B. N.S. 439.

I am, therefore, satisfied in my own mind that there being no dispute about the facts in this case, I am properly called upon and fully justified in disposing of it upon this application, upon the merits.

The Judgment creditor only swore to a debt due the judgment debtor, upon his information and belief. The Judgment Debtor and the County Treasurer have positively sworn there is no such debt. The first case to which I will refer as decisive on the peculiar facts disclosed in this case, is a judgment of the Court of Q.B. of U.C., given at the very inception of our municipal institutions: *Asken* v. *The London District Council*, reported in 1 U. C. Q. B. (The learned Judge then referred at length to this case, also to *Jones* v. *Corporation of Carmarthen*, 8 M. & W. 605, and to *Geraghty* v. *Sharkey*, which was decided in the Court of Exchequer, in Ireland, reported in full in 30 L. T., 204.) In this case the application is that of the judgment debtor only, and not of the garnishees, and as he is interested in the fund aimed at by the attaching order, supposing there were fees due to him as a public officer, the claim for which was not audited or approved by the Board at the time the attaching order was issued, I think he has a right to be heard, for if a lien upon it is sought to be maintained illegally or unjustly, or irregularly by the judgment creditor, he has the right to be heard and have that lien removed *ex debito justitiæ*, by having the order creating the lien discharged, provided it be maintained that, without any doubt at all, there is no debt attachable, and that the garnishees are not liable under it; for the simple reason that every man has a right to the direction and control of his own affairs, and to retain the receipt and disposition of his own assets, fees, and emoluments to himself; provided such his right has not been curtailed or interfered with, or taken away by an Act of the Legislature, or his own act—such as is done in the case of persons making assignments of their estate and effects for the benefit of creditors, or under the insolvent law in the case of persons subject to its provisions, for he is the only person who can give or authorize a valid order for its payment or a discharge to the person who is legally obliged to pay him.

It has been usual to serve a copy of the attaching order on the judgment debtor. The judgment debtor in this case might very properly interpose objections, supposing the garnishees had been summoned before the court or a judge, to show cause why they should not pay the alleged debt to the judgment creditor, and insist that the claim, such as or whatever it is, is not attachable. It is not every debt, even due to a judgment debtor, that is attachable; the claim may be attended with circumstances which would prevent the judgment creditor from enforcing its immediate payment, and where such is the case it is not a debt of the nature contemplated by the act (see *Kennett* v. *Westminster Improvement Commissioners* 111, Ex. 349), if then he might do so in another proceeding, I do not see why he may not adopt one of his own, and show the same facts as reasons for setting the attaching order aside. There is no express provision in the C. L. P. Act on this subject, but on the authority of *Jackson* v. *Randall*, 24 C. P. 88, I think I have the right to set the order aside.

The Statute respecting the disposal of county funds for the administration of justice, regulating the order and conditions upon which claims on the county may be paid, presents an insuperable difficulty in the way of any claim upon the county such as this judgment debtor may have for fees being considered garnishable, for the payment cannot be enforced against the county as a matter of absolute right, much less can it be treated as a debt. The conditions interposing are: First, that the claim has not been audited and approved by the Board of Audit; next there must be money in the Treasury available for the purpose of paying it, because all sums and claims which are entitled to priority of payment must be first discharged. The Board of Audit must not, under a penalty, order or give cheques for the paying of such, unless funds are so available, and unless all these obstacles are removed—(and although it

may be somewhat extra judicial for me to notice the circumstance, but being the Chairman of the Board of Audit I do know there were no funds whatever in the County Treasurer's hands at the time the attaching order was made), there could be no sum payable to the judgment debtor, and no reason either in fact or law for saying the garnishees were in any respect or for any cause indebted to the judgment debtor. This being the case I do not see, on the contrary I am satisfied, that not only *before*, but even *after* an audit, there is nothing due to the Clerk of the Peace and County Attorney by the garnishees as for a debt—within the meaning of the garnishee clauses of the C. L. P. Act.

An order must therefore be made for setting aside the attaching order, and the summons of the judgment debtor made absolute; but as it is for the relief of the judgment debtor, and not at the instance of the garnishees, it must be without costs.

QUEBEC REPORTS.

COURT OF REVIEW.

LIVINGSTONE v. THE GRAND TRUNK RAILWAY.

Railway Co.—Continuous Journey.

Held, That a passenger travelling with a railway ticket, from Montreal to Toronto, marked—"Good only for continuous trip within two days from date,"—and who leaves the train in which he starts at Kingston, where he remains several days, cannot afterwards avail himself of the ticket in payment of a trip on another train from Kingston to Toronto.

[January 31, 1876.—22 L.C. Jur. 15.]

This was a motion by plaintiff for a new trial, and a counter motion by defendant for judgment on the verdict.

MONDELET, J.—This was a trial before a special jury. The action was for the recovery of damages which the plaintiff alleged that he had sustained by being ejected from the Grand Trunk cars for not having the required ticket. The jury were of opinion that the plaintiff had no claim against the company, and this finding was in accordance with the instructions of the learned judge who presided at the trial. Two motions were now made, one for judgment on the verdict of the jury, and the other for a new trial. The facts were very simple. The plaintiff bought a ticket to go to Toronto, but when he got as far as Kingston he stopped over there. The ticket which he had purchased bore the inscription, "Good only for a continuous trip, within two days from date." A few days after the plaintiff alighted at Kingston he wished to pursue his journey, and took the train. At a short distance from Kingston he was asked for his ticket, and he produced the old ticket. The conductor told him that that ticket would not do, and the plaintiff having been first politely requested to leave the car, and having refused to do so, was ejected. It was for this ejection that he now claimed damages. The question was, whether this ticket constituted a contract between the plaintiff and the Grand Trunk. The conditions on it were that the journey had to be a continuous one, and had to be accomplished in two days. The question was, whether these conditions formed a contract or not. At the hearing His Honor had an impression that the plaintiff's pretension might be well founded, but he had come to the conclusion that the demand could not be sustained. Livingstone must have been aware of the conditions. Being a person of some education he ought to have read what was on his ticket. Even if a man could not read it was his duty to inquire what was on the ticket. If this ticket was not spent after two days when would it be spent? His Honor refered to the case of *Cunningham* v. *G. T. R. W. Co.*, 11 L. C. J. 107, a case more favorable to the plaintiff than this one, in which the Court of Appeals dismissed the action against the company.

JOHNSON, J.—The plaintiff brought an action for damages against a railway company for having been illegally ejected from their carriages on the occasion of his journey between Kingston and Toronto on the 10th of March last. The defendants pleaded that they were justified in what they did, and are not liable.

The facts are few and simple. The plaintiff being asked for his fare by the conductor, produced a ticket and refused any other payment, and was in consequence put off the train, without any unnecessary force being used. The sole question, therefore, was whether the ticket presented entitled the plaintiff then and there to be conveyed as a passenger in the defendants' carriages. The ticket is in these words:—"Grand Trunk Railway. Good only for continuous trip within two days from date. Montreal, West to Toronto. First-class." In one margin is stamped the date, namely, "6 March, '75," and in the other is printed the number 5,186. The Judge charged the jury, first, "that the meaning of the word continuous" was not, necessarily, (as had been contended by the plaintiff's counsel) the mere literal one of continuity of mechanical motion, which was a thing practically impossible throughout so

a journey; but was to be taken in a reasonable and practical sense, and might, for instance, be taken to mean, if the jury should be of that opinion, that there was to be such a continuous relation between the passengers and the train as was usual in railway travel in the case of through passengers; and, secondly, as regarded the knowledge of the plaintiff of the terms of his ticket, that if, by exercising the ordinary care and intelligence of passengers in his situation, he could, in the opinion of the jury have known what was printed on the face of the ticket, then there would be a contract between the parties according to those terms. The jury found unanimously that he had suffered no damages under the circumstances, and found specifically every fact alleged by the defendants in their plea: that the plaintiff bought the ticket on the 6th of March for a continuous trip, valid for two days from date; that he left Montreal in the train that evening, using this ticket; that he did not go on continuously to Toronto, but broke the journey by disembarking at Kingston, where he spent some days, and then reimbarked there on the 10th, using the same ticket, and refusing to pay otherwise, upon which the train was stopped, and the plaintiff was put out at the next station, without any unnecessary force. We are now asked to set aside this verdict for misdirection as to law, and for being contrary to evidence.

This case is not distinguishable in principle from *Cunningham* v. *The Grand Trunk Railway*, 11 L. C. J. p. 107, where the Court of Queen's Bench, composed of Judges Aylwin, Meredith, Drummond and Mondelet, unanimously held that a person purchasing from a Railway Company a ticket, stated on its face to be good only for a specified term, enters into a special contract, which is at an end as soon as such term has expired. It is hardly necessary to observe that the present case is not to be confounded with the class of cases where a common law liability is attempted to be avoided by conditions unknown to the other party. It was not put upon any such ground by the learned counsel who argued this motion. If it could be doubtful in a common-sense view of the matter, whether a person in the situation of this plaintiff, a highly intelligent commercial agent, would give his money without looking at what he got for it, there were circumstances proved in this case from which the jury was well warranted in believing that he had a very special reason for looking at it. It is proved in the case that this is a regulation designed to protect the corporation against fraud, which, it was also proved, could be very easily practised if the rule did not exist; and though a common carrier cannot divest himself of his common law responsibilities unless by a special contract, and therefore his own act alone must be insufficient to relieve him of such duties, yet he may and he must in many respects regulate the mode in which he is to perform those duties. See 46 vol. N. H. Rep., 213, where the judgment of the Supreme Court is given in the case of *Johnson* v. *Concord R. R.*

Plaintiff's motion rejected and defendant's motion granted.

UNITED STATES REPORTS.

COMMON PLEAS, PHILADELPHIA.

Lowry et al. v. Plitt et al.

Control of body after death.

After the proper interment of a body the control over it rests with the next of kin who is living. It cannot be transmitted or transferred.

Where there were several next of kin in the same degree and they differed in their wishes as to the disposition of the remains, a bill by the majority to enjoin the others from interfering with the removal of the remains to another place, was dismissed.

When a body has been properly buried in a vault, with the consent of all concerned; *quære* whether even the next of kin can remove it against the will of the vault-owner though the latter be a stranger.

This was a motion for an injunction heard on bill and answer. The complainants were the three sons of Henrietta Lowry, and the two executors of a deceased son, Lowry Donaldson Lowry; the respondents were Sophia W. Plitt, Elizabeth S. Edwards, and the Laurel Hill Cemetery Company. The bill set forth that Mrs. Henrietta Lowry died January 12th, 1866, at a house in Philadelphia, which had been purchased and furnished for her by her son, Lowry Donaldson Lowry, who was then residing at Lima, Peru; that at the time of the decease of Mrs. Lowry neither she nor any of her children had any place of family sepulture, and her remains were interred, without objection from any of her children present at her death, in a lot in Laurel Hill Cemetery belonging to her sister, Sophia W. Plitt; that, in 1869, Lowry D. Lowry returned to Philadelphia, and died there in 1871, leaving a will, wherein he bequeathed $5000, to be appropriated to building a vault in Laurel Hill Cemetery, in which he directed to be placed the remains of his mother, and of any of his brothers and sisters who had died,

or might thereafter die—also his own remains and those of his immediate family; that the vault had been completed, but that respondents refused permission to the executors of Lowry D. Lowry to enter Mrs. Plitt's lot for the purpose of removing Mrs. Lowry's remains to her son's vault. The bill prayed an injunction, forbidding respondents from hindering the removal. The answer of Mrs. Plitt and Elizabeth S. Edwards admitted the main facts set forth in the bill, but averred that Mrs. Lowry left a daughter surviving, viz., the respondent, Elizabeth S. Edwards; that the father, mother, four sisters, and a son of Henrietta Lowry were, previous to and at the time of her death, buried in the lot at Laurel Hill belonging to Mrs. Plitt, and which the latter had purchased with the concurrence of Mrs. Lowry for a family burial lot; that Mrs. Lowry, before her death, repeatedly expressed a desire to be buried in that lot, and on her death-bed gave express directions to that effect. Respondents denied the right of complainants to remove the remains, and declared that such removal would do great violence to their feelings.

Before the argument one of the three sons of Mrs. Lowry, complainants in this bill, died, and another one withdrew from the cause and opposed the removal.

The opinion of the court was delivered by

FINLETTER, J.—The controversy is about the right to disinter and remove, after appropriate obsequies, which were considered by all interested as final.

In *Wynkoop* v. *Wynkoop*, 6 Wright 293, it is clearly and broadly decided that, after interment, all control over the remains is with the next of kin. The reasoning which transfers this right from the widow is not satisfactory, because it does not seem to be based upon principle or reason; and is repugnant to the best feelings of our nature.

Such a right must necessarily be in the next of living kin. It is only the living who can give the protection, or be burdened with the duty of protection from which the right springs. It is only the living whose feelings can be outraged by any unlawful disturbance of the dead. From this it follows that it is a right which cannot be transmitted or transferred. It is, moreover, one in which all of the next of kin have an equal interest. The plaintiff, therefore, derives no authority over the remains of his mother from his brother's will; and in himself he has no better claim than his sister or brother. He is then without that clear, exclusive title, which alone is enforced by injunction.

When it is considered that the removal of the remains of Mrs. Lowry, involves an invasion of the rights of Mrs. Plitt, it is not clear that, even if all the next of kin had joined in these proceedings, we could have granted the relief prayed for. The law regards with favor "the repose of the dead." When they are inurned in the places selected by them, it must be something more than sentiment or abstract right which will induce us to enforce the claim of the next of kin, by the invasion of the burial-place of another. In such a case it may well be questioned whether the right of the next of kin exists at all.

This doctrine is more than foreshadowed by Chief Justice Read, in *Wynkoop* v. *Wynkoop*, when he says: "Besides, the fact that her son is deposited in her burial-place, in consecrated ground, and that he was buried with the ceremonies of the church, and with the honors of war, is sufficient to justify us in refusing permission to a removal under the circumstances."

Mrs. Lowry was buried where she desired to be; with the acquiescence of all her children. Those of them who survive are divided upon the question of removal. She is with her father, mother, sisters, and her first born. Upon the granite which marks their resting place her name is graven with theirs; and beneath it their ashes have commingled. It is fitting they should remain undisturbed.

The bill is dismissed.

(Note by Editor of *American Law Register*.)

We present this case to our readers, although not a decision of a court of last resort, as one of a class of cases not often met with in the reports. As said by Mr. Justice READ, in regard to cases of this kind, "it is of rare occurrence that any dispute arises after the burial, or that any case has been submitted to a court for its decision."

It is not necessary to trace the growth of ecclesiastical jurisdiction in these matters in England, as the rules of law there have never been adopted in this country, and possess but little more than an historical interest for us. BLACKSTONE shows clearly the state of the law in his day when the ecclesiastical jurisdiction in these matters had become fully settled.

He says: "Though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb their remains, when dead and buried. The person, indeed, who has the freehold of the soil may bring an action against such as dig and disturb it * * *:" 2 Black. Com. 429. Coke says: "The burial of the *cadaver* is *nullius in bonis* and belongs to ecclesiastical cognisance; but as to the monument, action is given at the common law for the defacing thereof:" 3 Inst. 203.

These principles were enforced by the King's Bench in the case of *King* v. *Coleridge*, 2 B. & Ald. 806; 3 Phill. 337, n.; which arose upon proceedings begun by one Gilbert for a *madamus* to compel the churchwardens of the parish in which he lived to permit him to bury his wife in the parish graveyard in an *iron* coffin. The *mandamus* was refused, the court saying that the *right* of sepulture was a common-law right, but the *mode of burial* was of ecclesiastical cognisance alone. The case was then carried into the Consistory Court, before Sir William Scott, upon articles against the churchwardens for their refusal to permit the burial as demanded by Gilbert. The reasons urged by the wardens for their refusal were that the parish was a large one and had but three small burying-grounds, and if a coffin of imperishable material was used the grounds would soon become useless and it would be impossible for all the parishioners to find room for burial.

On behalf of Gilbert it was argued that ground once given to the interment of a body is appropriated for ever, and the insertion of any other body into that space at any time, however distant, is an unwarrantable intrusion. The judgment of the court was that the use of an iron coffin was not unlawful, but that it could only be allowed upon payment of a larger burial-fee. The court in reply to this latter argument said: "The legal doctrine certainly is that the common cemetery is not *res unius ætatis*, the exclusive property of one generation now departed, but is likewise the common property of the living and of generations yet unborn, and subject only to temporary appropriation. * * * Even a brick grave without the authority of the ecclesiastical magistrate is an aggression upon the common freehold interest, and carries the pretensions of the dead to an extent that violates the first rights of the living: "*Gilbert* v. *Buzzard*, 3 Phill. 335.

In *Reg.* v. *Twiss*, 10 B. & S. 298, it was held that ground consecrated for burial purposes cannot be applied to secular purposes, nor the bodies of the dead buried in it removed by the owners of the soil without the authority of an Act of Parliament.

In *Reg.* v. *Sharpe*, 7 Cox C. C. 214, where a son, from motives of filial affection and religious duty, removed the corpse of his mother from a family burial-place in a desecrated burial-ground, for the purpose of interring it with that of his family in a consecrated church-ground, it was held that the act constituted an indictable misdemeanor. Earle, J., said, in delivering the opinion of the court: "Our law does not recognise the right of any one child to the corpse of its parent, as claimed by the defendant. Our law recognises no property in a corpse, and the protection of the grave at common law, as contra-distinguished from ecclesiastical protection to consecrated ground, depends on this form of indictment, and there is no authority for saying that relationship can justify the taking of a corpse from the ground where it had been laid." s. c. Dears & B. 160.

Two controversial books on the subject of burials have lately appeared in England; one "The Burial Question," by Charles J. Burton, Chancellor of the Diocese of Carlisle; and the other, "On the Law relating to Burials," published anonymously.

The earliest case that we have found in America is a curious controversy which arose in Pennsylvania over the remains of Stephen Girard, a number of years after his death: *In re Stephen Girard*, 4 Am. Law J. 97; 5 Pa. L. J. Rep. 68. Girard directed in his will that his body should be buried in the ground of the Holy Trinity Catholic Church; this was done. The councils of the city of Philadelphia, which was the residuary legatee under his will, removed his remains from their first resting-place, by permission of the board of health and of the authorities of the church, and left them temporarily in the charge of an undertaker, in order to a subsequent removal to a sarcophagus built for them at Girard College, where, it appeared, they were to be buried with Masonic ceremonies. A bill was filed by some of Girard's relatives, praying for a special injunction to restrain this action and an order on the city authorities to restore the remains to their former resting-place. Judge King, in deciding the motion, said: "Where a person was buried in a common burying-ground, where the title did not pass, the law did not furnish a remedy in reference to a removal; but a chancellor would intervene to prevent the

desecration of the grave. If I had been applied to before the removal of the body, I would have interfered. But this is not the case here. The city claims as the residuary legatee and her motive was to indicate respect and honor for the memory of the man. If the executors chose to disclaim it they might have done so, if they were executors, but if they disclaimed, the relatives might be parties alone. In all these aspects a court of equity might interfere. But the body has been removed and the relatives had a knowledge of it. Even here the court can interfere; but ordering the body back to its former place would be deciding the case; we are not asked to do this now. It would be deciding the case before a hearing."

The court then ordered that the body be placed in the sarcophagus at Girard College, as the most convenient temporary abode, until its final resting-place should be determined at the final hearing.

In this case the English doctrine, as set forth by Blackstone, was cited by eminent counsel as the law in Pennsylvania; but, as it appears above, the court did not find it necessary to decide the point. A case arising soon after this in New York received very full consideration at the hands of Samuel B. Ruggles, in a report to the Supreme Court, as referee "in the matter of widening Beekman street," in the city of New York. In that case it appeared that the commissioners of estimates, &c., had paid into court the sum of $28,000, as damages for certain land taken in widening that street. The land taken belonged to the Brick Presbyterian Church, and contained "vaults for the burial of the dead in which various individuals claimed rights of interment, and the use thereof for the funeral of the dead." One Sherwood had been interred in this lot in 1801 and his remains had rested there quietly ever since. His descendants claimed that the expense of re-interring them in such suitable place as they might select, and of erecting the monument that had always stood over them, should be paid out of this fund. It did not appear that any burial-fee had ever been paid to the church for permitting the body to be buried there. The referee was of opinion that the use of this cemetery was a charitable as well as a religious use, a trust which a court of equity in the exercise of its undisputed equity powers might duly control and regulate; * * * that it was proper to retain from the fund a sum sufficient to cover the expense of re-interring the remains of Moses Sherwood in a separate ground in such reasonable locality "as his descendants might select." In his report, the referee drew "the following conclusions, as justly deducible from the fact that no ecclesiastical element exists in the jurisprudence" of New York.

"1. That neither a corpse, nor its burial, is legally subject, in any way, to ecclesiastical cognisance, nor to sacerdotal power of any kind.

"2. That the right to bury a corpse and to preserve its remains, is a legal right, which the courts of law will recognise and protect.

"3. That such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin.

"4. That the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure.

"5. That if the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably re-interring their remains."

The Supreme Court, at a special term in 1856, confirmed this report in all respects and decreed accordingly; and also directed the church to reinter separately the remains found in any other of the graves whenever identified by the next of kin. See 4 Bradf. (Appendix) 502.

This case contains a very full exposition of the law of burial, and has been cited with approbation by the courts of other states.

In *Wynkoop* v. *Wynkoop*, 6 Wright 293, the case was this: Col. Wynkoop died in 1857, and was buried with military honors at Pottsville, in a lot belonging to his mother. Within a year his widow, who was also his administratrix, endeavored to remove his remains, but was refused permission by the owners of the cemetery and by her husband's next of kin. She thereupon filed a bill for an injunction restraining the defendants (the owners of the cemetery, the owner of the lot and her husband's next of kin) from interfering with the removal. The court, in dismissing the bill, *held*, that as administratrix the complainant's duty to bury terminated with the burial, and that as widow, "she would appear in that case to have no rights after the interment." The court further said, "that the fact that the body deposited in his mother's burial-place in consecrated ground, and that he was buried with the ceremonies of the church and the honors of war, was sufficient to justify a court of equity in refusing permission to a removal under the circumstances." This decision cannot be extended beyond the particular state of facts upon which it was based. It appears that the lot was owned by the mother of the deceased, and that he had been buried there

by his wife's consent. The court, therefore, only decided that a widow who consented to her husband's burial in a certain place, could not, against the wishes of his family, be allowed to remove his remains. It appears to leave undecided the question as to what voice a surviving husband or wife has in deciding where the deceased wife's or husband's remains shall be interred in the first place.

It has been decided that a husband has control over the remains of his wife: See the Ohio case, *infra*. It is reasonable that a widow, administering to her husband's estate, should, as against his heirs, choose his final resting-place, though this has never been decided. If she waives her right to administer, it would appear from the cases that the remains are under the control of the next of kin: See 4 Bradf. 503, *supra*. The reason given for depriving the widow of what would seem to be a natural right does not seem altogether satisfactory: it is that a widow may marry again and the custody of her husband's remains may thus pass into the hands of strangers. But in most cases burial-lots descend as real estate, and would commonly remain in the family of the husband, if originally his property. Arguments drawn from the civil law or even the English law would not avail in America, as the perpetuation of families, in the male branches, had in the early Roman system and has always had in England an importance which it does not possess in this country, and an essential part of this idea lay in the preservation in the line of the family of the tombs and monuments of the dead and of all the heirlooms and relics of the race.

It has been said that the expressed wishes of a testator as to the disposition of his remains will prevail over the wishes of his family: 4 Bradf. 503, *supra*.

Bogert v. *Indianapolis*, 13 Ind. 138, was an action by Indianapolis against Bogert, charging him with violation of a "cemetery ordinance." The court (per Perkins, J.) said *arguendo*: "We lay down the proposition, that the bodies of the dead belong to the surviving relatives, in the order of inheritance, as property, and that they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated. They cannot be permitted to create a nuisance by them. Hence a by-law might be reasonable where population was dense, requiring those buried to be sunk to a certain depth, or to be buried outside of where population was or was likely to become dense, and within a reasonable time after death, &c., but we doubt if the burial of the dead can, as a general proposition, be taken out of the hands of the relatives thereof, they being able and willing to bury the same."

A remarkable case that arose in Cleveland, Ohio, is reported (not very carefully) in Am. Law Times, July, 1871. The body of the plaintiff's wife was delivered to the defendants, who were physicians, for the purpose of dissecting its throat, in order, in the interest of science, to discover the cause of death. The defendants promised to perform the operation in the presence of the friends of the deceased, and to give the body a decent burial. By statements of the dangers of infection the defendants deterred the friends from attempting to see the remains at the medical college and held a pretended funeral on the day before the time appointed. It appeared afterwards that they had retained the body for general dissection and performed the funeral ceremonies over a coffin filled with rubbish. Upon a discovery of this fraud and upon threats of criminal prosecution the defendants sent the body in a rough box to the relatives of the deceased. The husband, who had been absent from home, upon his return brought suit for damages for laceration of feelings, expense of recovering the body, &c., and for the fraud. PRENTISS, J., in overruling a demurrer filed by defendants, said: "A corpse is not in itself so far property that it could be made an article of merchandise. A court would not enforce a contract for the sale of a dead human body. The same reasons which forbid the enforcing of such a contract, require that somebody shall have the right to the care and custody of a body for the purpose of securing it a decent burial. For this purpose the law gives a husband the custody of the dead body of his wife, a parent of a child and a child of a parent. The remedy (for infringing this right of custody) must be by civil action. * * * A body itself may not be property; but this right may be called perhaps a *quasi* property. At any rate it is a right which the law will enforce, and for an infringement of which an action will lie."

Pierce and Wife v. *Proprietors of Swan Point Cemetery and Almira T. Metcalf*, 10 R. I. 227, was the reverse of *Wynkoop* v. *Wynkoop*, *supra*. There the deceased, Metcalf, had died in 1856 and been buried in his own lot in Swan Point Cemetery, with the consent of his widow and in accordance with his own wishes. At his death this lot became the property of his only child, Mrs. Pierce. In 1869, against the consent of this daughter, and in violation of the by-laws of the defendant corporation, his re-

mains were removed by the widow, and placed in another lot in the same cemetery. His daughter filed a bill in equity to compel the restoration of the remains to their first resting place. The widow demurred to the bill for want of equity. The other defendant submitted to such order as the court might make in the case. The court, in overruling the demurrer, was of opinion that the remains should be restored to the place from which they had been taken. The view taken was that the person having charge of a body (in this case the corporation defendant) holds it as a sacred trust for the benefit of all who have an interest in it from family or friendship and that a court of equity will regulate this trust and change the custody if improperly managed. In this view, it was said, that it was not necessary to decide what might have been done had the child assented, or what the child might do of herself; and further that, although a body is not property, it may be considered a sort of *quasi* property to which certain persons may have rights, as they have duties, towards it arising out of common humanity. This case contains a very full discussion of the question.

The latest case we have found, except the principal case, is *Secor's Case*, 31 Leg. Int. 268. There it appeared that the widow of the deceased had decently interred her husband's remains, when his son, who averred that he had purchased a lot of ground pursuant to the instructions of his father (for a family burying-ground) insisted upon that being the proper place of interment. The Supreme Court for King's county, New York, upon motion of the widow, granted a perpetual injunction to restrain the son from removing the remains of his father. Pratt, J., in delivering judgment, said: "A proper respect for the dead, a regard for the tender sensibilities of the living, and the due preservation of the public health, require that a corpse should not be disinterred or transported from place to place, except under extreme circumstances of exigency." This ruling was sustained on appeal.

REVIEWS.

A KEY TO EQUITY JURISPRUDENCE. Containing over eight hundred questions. Designed for the use of Law Students. By R. S. Guernsey, of the New York Bar. Diossy & Co., 86 Nassau St., New York.

This work is for the express purpose of aiding law students in the study and to clearly understand this great branch of the law as a system, and as founded upon logical and scientific principles. The idea is novel, but has the great advantage of making the value of the book depend mainly upon intelligent industry of the student.

Story's Equity Jurisprudence, upon which this analysis and questions and alphabetical index are founded, is referred to by the chapter and titles containing the subjects and answers to the questions used, and is for the purpose of requiring the student to make a note on the margin and space for that purpose, briefly stating the answer to each question, and showing where it can be found.

This edition of the work contains a blank page to each page of questions, and allows more extended notes of references, or answers and an analysis, to be made in the course of reading or actual practice, and thus it will serve as a general index of notes and references to authorities, leading decisions, statutory alterations, &c., making a useful and practical index legum, or Lawyer's Common-place Book on this branch of the law.

The arrangement is such that the chapters and questions comprise an outline and skeleton analysis of the entire system of Equity Jurisprudence, and the student may use any one or more standard works to fill up the subject.

INFORMATION FOR ASSESSORS. Barrie, Wesley & King, publishers, 1877.

This is described as being "the substance of an address, and extracts from the pamphlet and papers on the duties of municipal officers, issued by their Honors, the judges of the County of Simcoe; with additions and references to recent enactments. Compiled by order of the County Council."

This pamphlet contains much useful information for assessors, all Acts bearing upon their duties, (including those of the session just over,) being referred to and commented on.

The "address" is one that His Honour Judge Gowan delivered at Barrie, in January last, before the County Council, at their request, to the assessors of the county. The "pamphlet" referred to was one entitled, "Suggestions to Municipal Officers," by Judge Ardagh, published a couple of years ago, which obtained a large circulation and proved of great assistance to assessors. The Voter's List Act, has of course superseded in a great measure the use of that pamphlet, but what is now of value has been retained by Mr. Banting in the manual before us. We can well believe also that the utterances of a judge so careful, learned and experienced as is the Senior County Judge (Judge Gowan) give the manual great additional value. We notice that many of the forms given in the Act referred to are apparently adopted from those prepared for the pamphlet published by Judge Ardagh.

The International Review, New York. A. S. Barnes & Co. Bi-monthly. $5.00 per annum.

We have before us the last three numbers of this now popular Review. In the style of its articles, it may be said to occupy a place between the old quarterlies and the best monthlies, such as dear old "Blackwood." Its writers comprise some of the best men in Europe and America, and its articles are not surpassed by those appearing in any of the standard Reviews. The article by Dr. Freeman on the "Origin of Parliamentary Representation in England," which we recently copied into this journal, is a fair average specimen of the matter contained in the "International," and its perusal will be sufficient to show that this average is very high. That the "International" embraces a very wide range of subjects is only what might be expected from the number of writers who contribute from time to time to its pages. This may easily be seen from the contents of the last number, March—April:

I.—The Administration of President Grant. An Independent Republican.

II.—Theory and Practice in Architecture. Jas. C. Bayles, of the Iron Age.

III.—Two Past Ages—Sonnet. Chas. (Tennyson) Turner, England.

IV.—German Comic Papers. Julius Duboc, Dresden.

V.—Two Norse Sagas. Prof. Hjalmar H. Boyeson, Cornell University.

VI.—Responsible Government. Prof. Van Buren Denslow, LL.D., Union Law College, Chicago.

VII.—The University of Upsala. Prof. Karl M. Thordén, Sweden.

VIII.—James Russell Lowell and Modern Literary Criticism. Ray Palmer, New York.

IX.—Contemporary Literature, Art, Science, and Events.

1. Recent English Books.
2. Art in Europe.
3. Scientific Progress.
4. Contemporary Events.

We strongly recommend those of our readers who desire a periodical supply of first-class literature at a nominal price to subscribe for this Review.

American Law Review. Boston: Little, Brown & Co.

Not the least interesting portion of this Quarterly is that which comes under the head of "Book Notices." Very generally containing able criticisms on law books, they are often amusing as well.

The reviewer, in writing of a little book called *Leading Cases done into English*, discourses pleasantly of the thought that came to him on reading the book, which is similar to that of Daniel Webster, who made the suggestion: "If the legislature will but put our writs into a poetical and musical form, it will certainly be the most harmonious thing they ever did." He thereupon put into verse a writ which he was then filling out in his little country-office. It ran as follows; viz:—

"All good sheriffs in the land,
We command,
That forthwith you arrest John Dyer,
Esquire,
If in your precinct you can find him,
And bind him."

The reviewer then unfolds his suggestion thus :—

"What the times demand, what the profession requires, is a poetical reporter of the decisions of the Supreme Court. Perhaps the suggestion will be made, that it would be much better to have, at least, one member of the Bench itself a poet ; and that the other members could do the necessary and useful work of making the decisions, while the poet could make them beautiful. We admit fully the truth of this suggestion ; but let us make haste slowly. We cannot spare, at present, the services of any of the worthy occupants of the Bench ; and we fear that they are too old to begin to poetize now. But we can easily have a poetical reporter now ; and when the next vacancy occurs upon the Bench, we can bring the requisite pressure to bear upon the appointing power, and secure our *desideratum*.

Let, then, the reporter begin at once to practice his new profession, and give us at least the rescripts, as they come down from the Supreme Court, aptly clothed in the robes of poetry. For instance, take the collected wisdom of the court in the matter of women's right to office, could it not be briefly expressed thus :—

'Woman ! thy mission is to please :
Not to be justice of the peace ;
Content with what the laws allow,—
A school-committee woman, thou !'

Opinion of Justices, 106 Mass. 604."

And again he urges that the reports are full of proper materials for reports :—

"Take the long struggle of fallen man and woman, upon the slippery sidewalks of the cities, to obtain reparation for their sufferings. The unsuccessful attempts might properly be put into some elegiac measure ; but when, after years of failure, there arose a new reformer, a second Luther, who discovered that ridges of snow were actionable defects for which towns were liable, who succeeded in finding the ridges and in obtaining a verdict for a fall thereon, would not the tale of his success be fitly expressed in light and flowing lyrics, not wholly unmindful, however, of the gravity of the event? We offer, modestly, the following example of how it might be done :—

'In Worcester, when the sun was low,
Trodden in ridges lay the snow ;
Across the walk he tried to go,
But fell, tho' walking carefully.

"Had Luther seen another sight,
Of sidewalk smooth with ice that night.
Without a ridge thereon, he might
Have suffered, without remedy.

"The court this plain distinction draw :
'When ice and snow, by natural law,
Are slippery found before your door,
You fall,—the town's not liable.

"'But when by man they're trodden down
In ridges, or an icy crown,
You, falling then, can sue the town,
And get your heavy damages.'

Luther v. *Worcester*, 97 Mass. 272."

The writer closes by a very "happy thought." We have thought it often on various occasions.

"We should have liked to lay before our readers a merry rhyme, suggested by the case of *Commonwealth* v. *Vermont R. R. Co.*, 108 Mass. 7, based upon the unexpected extinction of a popcorn boy, by the very railroad train in which he had for many years tortured the helpless passengers. We have done our duty in bringing the subject before the public. There are others equally tempting ; but we must stop somewhere."

We lay before our readers at p. 121 *post*, our contribution to legal lyrics.

CORRESPONDENCE.

County Judges as Benchers.

To the Editor of the Law Journal.

Sir,—It appears from a summary of the proceedings in Convocation in February last, that a resolution was passed, to procure an amendment of the Law, by providing that any member of Convocation who should hereafter be appointed a Judge of a County Court should thereby vacate his seat as a Bencher.

Is any such statutory provision required? According to the ancient usage and custom of the Benchers of the different Inns of Court in England, a County Court Judge has been always held ineligible and disqualified for holding a seat in Convocation, and this has also been the established usage here, there being no precedent of such an appointment.

Does not then a bencher by acceptance

of a County Judgeship virtually resign his seat?

When the late Sir James Macaulay became Treasurer of the Society, he—not being aware of the rule or custom—proposed the election of a certain County Judge. After a search for precedents and after considerable discussion, Sir James became satisfied of the disqualification and abandoned his motion.

An Ex-Bencher.

FLOTSAM AND JETSAM.

The Baltimore *Sun* says that on the occasion of the visit of Dom Pedro to the Supreme Court chamber in Washington, recently, he was conversing in an audible tone with the Brazilian minister, while Justice Miller was reading an opinion. The marshal of the court rapped and commanded silence, and Justice Miller, not knowing who the offender was, suspended his reading and remarked sternly: "We allow but one to talk here at a time." The emperor was quite discomfited, became silent at once, and as soon as he recovered his equanimity left.

It is stated in *Who's Who* for 1877 that the oldest judge in England is the Right Hon. Sir Fitzroy Kelly, Lord Chief Baron, aged 81; the youngest is Sir Nathaniel Lindley, of the Common Pleas Division, aged 49. The oldest judge in Ireland is Mr. Justice O'Brien, of the Court of Queen's Bench, aged 71; the youngest, the Right Hon. Christopher Palles, LL.D., Lord Chief Baron of the Court of Exchequer, aged 46. The oldest of the Scotch Lords of session is Robert Macfarlane, Lord Ormidale, aged 75; the youngest, Alexander Burns Shand, Lord Shand, aged 48.

A few years ago a man was on trial in Waynesboro', Tennessee, on a charge of murder. The evidence for the State was fatally defective, but the prosecuting attorney, an obstinate fellow, irritated by the conduct of defendant's counsel, insisted on argument. Court adjourned until next morning, meanwhile the attorney-general spent a good portion of the night in ransacking the books for "bloody cases," especially those in which the judges had indulged in a vast deal of rhetoric over the horrible nature of the crime of murder. These extracts he read to the jury next morning, quoting freely from the Old Testament as to the proper disposition to be made of the murderer, and closed in a perfect conflagration of adjectives in describing the "indescribable heinousness" of the crime. The court charged briefly, and the jury, after a few moments retirement, returned a verdict of "guilty in the first degree." Of course a new trial was at once granted. Defendant's counsel, however, was naturally curious to know how the jury *could* have found that verdict and asked one of the most intelligent members, "How on earth did you find that verdict? On what evidence did you base it?"

"Oh!" said the juryman, "thar wa'nt nothing in the *evidence* that *teched* him; but you see, Squire, *the law was so d—d strong.*"

In the life, letters and table talk of the painter Haydon, recently published, there is the following curious notice of a contempt of court case: "April 5th, 1832—Dined with Major Campbell, a man who greatly distinguished himself in the Peninsular war. He ran away with a ward in chancery. Lord Eldon, before whom he was brought said, 'it was a shame that men of low family should thus entrap ladies of birth; 'my lord,' retorted Campbell 'my family are ancient and opulent, and were neither coal-heavers, nor coal-heaver's, nephews' in allusion to the chancellor's origin. Eldon committed him on the spot to prison for *thirteen years* for contempt, and refused to accept an apology. On Brougham's accession, Campbell petitioned, and by a special order he was discharged. When Eldon committed him to prison, his wife, who was only a girl of fifteen, went to her mother in Scotland. They allowed him on his word to see her to Gravesend. She cried incessantly, and died soon after from a broken heart. * * * He was at the storming of Ciudad Rodrigo, Burgos, Badajoz, and St. Sebastian. As early remembrances of his campaigns, his loves, his vices, his triumphs, and his disgraces crowded his imagination, his face, heated by wine, shone out, his eye seemed black with fire, his mouth got long with revengeful feelings. He looked like a spirit escaped from Hades wandering till his destiny was over."

On the occasion of his retirement from the chair of Real Property in the Law School of Hartford University, (a posi-

tion which he has long and honorably filled), Prof. Washburn took occasion to give his class a few words of friendly counsel. Among the many subjects that he touched upon in the course of his remarks was one which has given most of the debating societies in the country a good deal of trouble, viz: "Is a lawyer justified in defending a client whom he believes to be guilty?" Upon this point the learned gentleman says:

"I wish to say a few words upon a matter which troubles sensitive minds, both inside and out of the profession, and that is, how far a lawyer can honestly and honorably engage in the defense of a person charged with a crime, where he has reason to suppose his client is guilty. To my mind there are no two sides to the question, provided the lawyer deals fairly with what properly comes before the court. He has no right to tell the jury he believes his client innocent, if he does not. But he not only has a right, it is his duty, to see that the defendant has fair play, and if the proof of his guilt fails, or the witnesses against are prejudiced or perjured, he is bound to give his client the benefit of its exposure, and if he thereby escapes, justice may fail in that particular case, but the great and holy cause of justice will be advanced by it. Such trials are not mere battles between the Common-wealth and the prisoner at the bar. They are but incidents in the working of that system, upon the purity and integrity of which, men hold their lives, their property, and everything they account dear, in security. Men believe these to be safe because they hold them by the same law which watches over and guards the rights and persons of their fellow-citizens from the humblest to the highest. But let it be ever understood that if a man, because he is poor and friendless, under a charge of crime, can be seized and dragged before a court, and because there is a popular clamour against him no man can be found to see that he is fairly dealt by and fairly convicted if found guilty, his conviction and punishment would do more to weaken public confidence in the administration of the law than the escape of a score of of men suspected of crime. No; the lawyer who in such a case consents to take the defense of such a man, and conducts it in good faith, instead of doing a dishonest or dishonorable act, is a benefactor to the community who cry out against him."

"*WHO IS MY NEIGHBOUR?*"

A poetical friend from the ancient capitol sends to us the following parody suggested to a "First Intermediate," on reading Smith on Neighbouring Proprietors. It is so good that we do not apologise for its insertion in these days of legal poeticisms:

Thy neighbour? It is he whom thou
Of all men hatest most;
Who's ever anxious for a row,
Nor lets a chance be lost.

Thy neighbour? It is he whose cows
Grow fat upon *your* grass,
Whose horned cattle calmly browse
"With sweet unconscious grace,"

In *your* potato patch, and feed
With no felonious bent,
But *bona fide*—clearly freed
From aught of ill intent.

Thy neighbour? It is he who digs
A well that draineth yours,
Lets loose his sod-uprooting pigs,
And floods you with his sewers.

He, who to malice much prepense,
To wilful inj'ry prone,
Refuses to put up his fence
Or keep his fowls at home.

Thy neighbour? Who from purest spite,
At half-past nineteen years,
Obstructs your almost "ancient light"—
Gives vict'ry to your fears,

When hope had almost won the day;
Then makes unkindest sport,
And aggravates you by the way,
He insult adds to tort.

Who opes a window on your yard,
Your privacy invades,
And guards it with a light he's had
For over two decades.

Thy neighbour? Ask me not again,
But ere this day be run,
Go! mix among your fellow men,
And seek him—with your gun.

J. B. M.

Kingston.

CROSSING THE RUBICON.

This being the season of law examinations, we deem it not inappropriate to re-print from the Edinburgh *Law Magazine*, the following lines, written by one who had passed his final examination :

Despite of a little fear lurking,
I have pulled through my final Exam.;
So adieu for a short time to working,
And farewell forever to cram.
I shall put on my gown—not unheeded ;
Some, seniors, shall wish me good luck,
Will tell me of men who've succeeded—
Not a word about those who have stuck.

In this breathing space, just for a moment
I brood, and I muse, and inquire,
What my fortune is—well or ill omened ?
What my portion is—lower or higher ?
Come, tell me, thou ancient *haruspex*,
Are we classed with the fortunate few ?
Shall sunshine or shade rest on us specks
Of cloud in the infinite blue ?

Shall the barque of my fortunes, a "clean ship"
Return to the port whence it came ?
May I ever aspire to the Deanship,
And to leaving a notable name ?
Shall I come to be Lord Justice-General,
Or only be Lord Justice-Clerk ?
Comes a sinister whisper, " New men are all
Inclined to shoot over the mark."

Shall I rank with the forcible-feebles,
Or shall I come out as a star ?
Shall I try salmon fishers in Peebles,
Preferring that much to the bar ?
Shall I, waft on the wild wind, be borne away
To regions forlorn and remote ?
To Lerwick, Lochmaddy, or Stornoway,
Where life is not worth half a groat ?

After years shall I willingly take a
Decent banishment out in Ceylon,
Judge coolies and blacks in Jamaica,
Or elsewhere in some tropical zone ?
On the Gold Coast, o'er niggers and Krooman,
Shall it be my sad fortune to reign ?
Nota bene, some good men and true men
Such little jobs did not disdain.

Or tied to the helm of some journal,
Shall I drudge through the sultry July,
And feel it not easy to spurn all
Temptations to have a "good shy ?".
Let the high Fates our fortunes determine—
Yet what matters their smile or their frown ?
Some hearts have been sad 'neath the ermine
That were merry beneath the stuff gown.

I own, like the rest of mankind, most
Legal folks rather favor the first ;
So with watchword of " Deuce take the hindmost ! "
Let us go at our work with a burst.
Nay ; nay ! with an honest endeavor,
With a spirit that's gallant and true,
Let us strive and be thankful—whatever
The Fates bring to me and to you.

American Funeral Oratory.—The *London Law Times* has had frequent articles commenting severely upon speeches made by members of the American Bar upon funeral occasions, and not without reason. The *Law Times* says :

" We have more than once given our readers some examples of funeral oratory in America on the occasion of the deaths of lawyers of reputation. Judge Lynd, of the Pennsylvanian Court of Common Pleas, died recently, whereupon the Bar had a meeting. Judge Lynd, judging from the speeches, has never had an equal in virtue, integrity, industry, and ability. " No man," we are told, " is necessary to the public ; " but, nevertheless, the loss of Judge Lynd is " irreparable." There would appear to be some mysterious process in Philadelphia for detecting corrupt judges, for one speaker says that Judge Lynd passed through life without reproach. " There was no smell of fire upon his garments." Judge Ludlow was particularly brilliant, thus describing the decease of the late Judge : " The pale horse and his rider ranged through the world at all times, but as the hours of this fatal day rolled into the flood of time with savage fury, on every moment of each he wrote ' Death's Own ! ' " Judge Briggs was less happy, and positively found a flaw in his deceased brother. " As a speaker," he says, " he was not so successful. He gave conclusions, but without his reasons, thus leaving his hearers to work up to them as best they might." This is rather severe. The Hon. Charles Gibbons also forgot the solemnity of the occasion, for he made a fierce attack on " that beggarly system of economy that is practised in this country, that refuses to public servants a decent compensation for public services." The climax of misery, however, was reached by Judge Ludlow, who sent his hearers away with this pleasant interrogatory, " friends and brothers, who will fall next ? "

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Hilary Term, 40th Victoria.

During this Term, the following gentlemen were called to the Bar; the names are given in the order of merit.

Albert Clements Killam.
Thomas Hodgkin.
Cornelius J. O'Neil.
Francis Beverley Robertson.
Henry Ernest Henderson.
Hamilton Cassels.
Francis Love.
William Wyld.
Thomas Caswell.

The following gentlemen were called to the Bar under the rules for special cases framed under 39 Victoria, Chap. 3.

George Edmonson.
Frederick W. Colquhoun.
Edward O'Connor.
John Bergin.

The following gentlemen received Certificates of Fitness:

J. H. Madden.
H. Cassels.
J. W. Gordon.
J. Dowdall.
C. J. O'Neil.
T. M. Carthew.
T. J. Decatur.
T. D. Cowper.
A. W. Kinsman.
C. McK. Morrison.
C. Gordon.
F. S. O'Connor.
G. S. Hallen.

And the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:

Graduates.

Charles Augustus Kingston.
John Henry Long.
James J. Craig.
William Fletcher.
Leonard Harstone.
Patrick Anderson Macdonald.

Junior Class.

Benjamin Franklin Justin.
John F. Quinlan.
John Williams.
Joseph William MacDowell.
Phillip Henry Drayton.
Thomas A. Gorham.
James R. Brown.
George J. Sherry.
Hector McKay.
D. Henderson.
Alexander Carpenter Brazeley.
John Bertram Humphries.
Lauren G. Drew.
Herman Joseph Eberts.
Solomon George McGill.
David Johnson Lynch.
Thomas Henry Loscomb.
John Vashon May.
George Moir.
J. H. Macallum.
Hugo Schliefer.
David Robertson.
Angus McB. McKay.
Charles Rankin Gould.
William James Cooper.
Edward Stewart Tisdale.
Francis Melville Wakefield
Alexander Stewart.
Thomas Miller White.
John Arthur Mowat.
Henry Bogart Dean.
George Robert Knight.
Humphrey Albert L. White.
John Wood.
George Benjamin Douglas.
Alexander Humphrey Macadams
Hugh Boulton Morphy.
William Henry Brouse.
George J. Gibb.
Frederick E. Redick.
William Masson.
Edward Guss Porter.
Thomas Robert Foy.
Henry Albert Rowe.
Thomas H. Stinson.
Stewart Masson.
Francis Evans Curtis.
William Steers.
Robert Taylor.
Henry M. East.
Armour William Ford.

Wm. Marvin McDermott.
Charles W. Phillips.
Wellington Smaill.
John Clyde Grant.
George Merrick Sinclair.
George Walker Marsh.
Edward Albert Foster.
Frank Russell Waddell.
Francis P. Conway.
Henry Dexter.
William T. Easton.
Albert Edward Wilkes.
James Lane.
John Henry Cooke.
Alexander Howden.
Douglas Buchanan.
John Alexander Stewart.
Arthur Mowat.
John McLean.
Robert Cockburn Hays.
William Aird Adair.
Ernest Wilbert Sexsmith.
John Baldwin Hand.
James Barrie.
George Frederick Jelfs.

Articled Clerks.

Noble A. Bartlett
Owen M. Jones.
Eugene Maurice Cole.
Ernest Arthur Hill Langtry.
John Oberlin Edwards.
J. A. Loughheed.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission as Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects:—

CLASSICS.

Xenophon Anabasis, B. I.; Homer, Iliad, B. I. Cicero, for the Manilian Law; Ovid, Fasti, B. I., vv. 1 300; Virgil, Æneid, B. II., vv. 1-317, Translations from English into Latin; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of quadratic equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; An examination upon "The Lady of the Lake," with special reference to Cantos v. and vi.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar. Translation of simple sentences into French prose. Corneille, Horace, Acts I. and II.

or GERMAN.

A paper on Grammar. Musæus, Stumme Liebe Schiller, Lied von der Glocke.

Candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), are required to pass a satisfactory examination in the following subjects:—

Ovid, Fasti, B. I., vv. 1-300,—or
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

A Student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk, (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

All examinations of Students-at-Law or Articled Clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

THOMAS HODGINS, *Chairman.*

Osgoode Hall, Trinity Term, 1876.

Adopted by the Benchers in Convocation August 22, 1876.

DIARY FOR MAY.

2. Wed..English slave trade abolished, 1807.
5. Sat....Queen Victoria declared Empress of India,'76.
6. SUN..*Rogation Sunday.*
8. Tues..General Sessions and County Court sittings in York. Law Society Primary Examination.
11. Fri....Ascension day.
13. SUN..1*st Sunday after Ascension.* Hon. J. Crawford, Lieut.-Governor died, 1875.
14. Mon..Law School Examination.
15. Tues..Law Society—1st intermediate examination.
16. Wed..Law Society—2nd intermediate examination.
17. Thur..Law Society—Attorneys examination.
18. Fri....Hon. D. A. Macdonald, Lieut.-Governor of Ontario, 1875. Examination Call with honours examination for call to the Bar.
20. SUN..*Whit Sunday.*
21. Mon..Easter term begins. Law Society Convocation meets.
22. Tues..Earl Dufferin, Gov.-General, 1872. Convocation meets.
24. Thur..Queen Victoria born, 1819.
26. Sat....Law Society Convocation meets. Annual election of Treasurer takes place.
27. SUN..*Trinity Sunday.*
30. Wed..Abdul Aziz, Sultan of Turkey, dethroned,'76.

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THE

Canada Law Journal.

Toronto, May, 1877.

We are told by the English *Law Journal* that the list of causes for the Easter Sittings in the Chancery Division is "one of the most appalling documents ever witnessed." It contains the names of 602 suits waiting to be heard. Of these the Master of the Rolls has 122, Vice-Chancellor Malins 189, Vice-Chancellor Bacon 90, and Vice-Chancellor Hall 201. We have complained occasionally of the "block" of business in our Courts, but there has never been anything to compare with this. The same journal implores that a new Judge may be appointed to the Chancery Division.

CONSTRUCTION OF THE ADMINISTRATION OF JUSTICE ACT.

The Court of Chancery has gone a very long way in giving such a strict and inflexible construction to some clauses of the Administration of Justice Act of 1873, as goes far to neutralize the value what we conceive to be of those clauses, and to countervail, as it seems to us, the intention of the Legislature. The main purpose of the first and eighth and kindred sections of the Act, was to enable each Court to work out full relief in respect of every matter properly presented for adjudication in the one suit. But it is nowhere apparent in the Act itself that this was intended to be extended to cases not falling within well-understood principles, and it is foreign to the spirit of the statute to hold that its permissive provisions should be petrified into a compulsory practice. It is a matter of consideration whether the Act was ever intended to accomplish such a result as is declared to be the law in *Demorest* v. *Helms*, 22

Gr. 433. That decision in effect completely transforms the character of an action of ejectment, and makes the judgment therein final as between the parties to it, not only in respect to the possession of the land at the time, but also in respect to the title to the land, which either party has, or might have, presented on the record. There are again other cases in which it has been held, that the plaintiff must of necessity bring in third parties, strangers to the suit, at the instance of a defendant; and others in which it is laid down, that when the plaintiff has proceeded in any Court to realize his debt or claim, he is bound under peril of demurrer, to prosecute in that Court all subsequent proceedings he may require to take, in order to enjoy the fruits of his judgment by way of equitable execution or the like. The Court of Appeal will very likely be called upon before long to pronounce upon the correctness of these principles of construction as applied to this Act, and we shall not be surprised if a series of cases on these points is found to be open to impeachment.

It seems contrary to principle to hold, as has been done in many cases in equity, where a defendant has a remedy over against another person, a stranger to the suit, and sets that up in his answer, that it is the duty of the plaintiff to amend his bill and bring that third person before the Court. The pleading in equity proceeds upon this, that one defendant is supposed not to know, or at all events not to be affected by, what is found in his co-defendant's answer. Whatever the rights as between co-defendants, why should the plaintiff be delayed or embarrassed by these questions? However the limit of cases decided in this direction, previous to the Administration of Justice Act, has been, where the rights over as between co-defendants arose out of contract, express or implied as in *Ford* v. *Proudfoot*, 9 Gr. 478. But since the Administration of Justice Act, this limit has been stretched to meet cases where the remedy over was based on a fraudulent or tortious act. This is surely an unexpected and an unwarrantable extension of the rule as to adding third parties.

The English Courts, in applying the analogous provisions of the Judicature Act, have laid down some valuable principles, which are pertinent to the proper construction of the Ontario Statute. In the *Swansea Shipping Co.* v. *Duncan*. 25 W. R. 233, (Feb. 1877), the Court of Appeal held that the object of the Act was to prevent the same controversy being tried twice over where there is any substantial question common as between the plaintiff and defendant in the action, and as between the defendant and a third person: in such a case the third person is to be cited to take part in the original litigation, and so to be bound by the decision on that question, once for all. In any such case, however, the Court will also consider whether this can be done without prejudicing or delaying the plaintiff.

In *Evans* v. *Buck*, 25 W. R. 392, the Master of the Rolls held that a person could not be added as a defendant to a counter-claim against whom relief was claimed in one only of two inconsistent alternatives. The decision was based on the well-known principle of pleading, that a bill cannot be filed praying for alternative relief founded on inconsistent allegations.

In *Norris* v. *Beazely*, 25 W. R. 320, Lord Coleridge makes a distinction, forgotten in some of the Ontario cases, that the object of the Act was not that complete justice might be done between the parties, but that all questions involved in the action might be effectually and completely adjudicated upon. There such a construction was given as that the plaintiff was held to be not obliged to add a

person against whom he did not wish to prosecute any claim, and whom the defendant wished to be added, merely for his own convenience. The Court said the principle should be strictly applied, for otherwise the Act might be used in a way exceedingly harassing to a plaintiff, who might be embarrassed and involved in suits in which he had no kind of interest.

The spirit of the Administration of Justice Act is to be found in the clause which declares that no proceeding, either in law or in equity, is to be defeated by any formal objection. The Court should not then be rigorous as to the manner in which relief is sought. If, after judgment recovered the *forum* is changed, that should not be a reason for refusing to entertain the suit, but it would be a reason for refusing to give more costs than would have been incurred by prosecuting the claim in the original *forum*. Following out this the Court has rightly concluded that there is no cast-iron rule as to allowing amendments. A discretion may be exercised to grant or refuse the amendment according to the circumstances of the case, as is pointed out in *Guggisberg* v. *Waterloo Insurance Company*, 24 Gr. 350.

LEGAL AND—OTHERWISE.

A subscriber has sent us a post card addressed to him, on the reverse of which is printed the following advertisement:

"—— ——"

"Solicitor, &c., &c.,
Box —, ——, Ont.
"Solicitor in Chancery and Surrogate Court,
"Attorney and Conveyancer.
"Farms bought and sold; Loans negotiated on
"all kinds of property.
"Marriage Settlements, Wills, Trusts and In-
"solvency made specialties. Houses and Lots
"rented and to rent, bought and sold. Stocks:
"Dominion and Banks. Funds: Currant and
"un-currant (*sic*) Debentures: Dominion and
"Municipal. Insurance on Life and against
"Fire. All dealt in a shade above central rates.
"Agent for Foreign Bequests and Claims in
"all parts of the world, especially the United
"Kingdom.
"Office, near the Post office, Town of ——,
"Province of Ontario.
"N.B.—Agent for Bunker's Deep Well and
"Force Pumps, &c."

This is positively too funny. We have seen all sorts of advertisements, professional, mercantile and "mixed," but if ever there was anything before that was so utterly irresistible, we should like to see it. We know some students who would delight, after reading Stephens, to draw a demurrer on the ground of multifariousness, but they would be of the nation that requires a crowbar to get a joke into their heads. It is really a pity to say a word more. It is like a labored explanation of a good bon mot, or first-class pun. To those, however, who have not given this matter the long and careful study that we have, we feel it our bounden duty to submit the result of that study and the careful analysis that accompanied it. A casual reader who had not read it more than half a dozen times, looking for the sweetest morsel, might imagine that "Funds" is a misprint for "Buns." We have from the first been struggling against the conviction that "Currant" was a Latin word (3d plural), helped on by the long-ago acquired knowledge that Funds *do* run like—we will say, the statute of limitations against unhappy creditors, or perhaps it would be better to cite in this connection the Insolvent Act, and here we notice that "Insolvency made a specialty," coupling it (in the singular) with Trusts (in the plural), the one following the other here as naturally as it does in every day life. One friend who helped in our analysis thinks that the word "Funds" has been misplaced, and that the words "Currant and un-currant" refers to the grocery department of the advertiser's business, and that "un-currant" means those dried fruits that are *not* currants. All our rumination, however, has thrown no light on one point, and that is as to who "all" are, whether clients, stocks or funds, and how they are "dealt

in." If he had said dealt *out*, then "funds" would apply, and applications would then, no doubt, be prompt and numerous. We regret, though, to hear of any dealings by a professional man in the *shade*, for how could they then bear the open scrutiny of day.

We would warn our readers not to run away with the idea that at first possessed us respecting the N.B., that it meant *near Boston*. Our mind, not unnaturally took this train of thought, glancing at the name following, and that the "deep well" advertised was dug by the same man who built the big hill (or the monument, which was it?) near the aforesaid city, quite overlooking in our gross materialism the subtle suggestion of this would-be benefactor of the legal race, about truth lying at the bottom of a well: a safe depository for secrets, etc: and, last of all, but by no means least, the means of *working* an unwilling or refractory client. An ordinary intellect fails to grasp the magnitude of the announcement, that this modest peddler of patent pumps is also the agent not only of "foreign bequests and claims" in the United Kingdom, but is also their agent in other foreign countries: to wit, the whole world. The "etc." at the end of this advertisement tells us that we have only been told of half the advertiser's business. Having done so well, "and we thank him much for that," let him also tell us

> 'Of shoes—and ships, and sealing wax—
> Of cabbages—and Kings—
> And why the sea is boiling hot—
> And whether pigs have wings,"

or even of *fat cattle*, for we are privately informed that the modest advertiser is not unknown in the place where the "lowing herd" change their owners and pass into the hands of those who make fat the lean kine.

Yes, let our funny friend write one more advertisement and we shall publish it free gratis as gladly as we do the one before us.

NOTES OF CASES

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

HARRIS v. SMITH ET AL.

From Q.B.] [Sept. 28, 1876.

Easement—Right of way—Severance of tenements—When the right will pass—"Appurtenances"—Pleading.

Declaration for breaking and entering the plaintiff's close, being a yard in the rear of a certain shop and premises, and throwing down a brick wall there.

Plea: that before the alleged trespass one J. D. was seized in fee of the said shop and premises, and of the said close: that the occupiers of the shop enjoyed as of right and without interruption a certain way on foot and with cattle from a public lane over said close to said shop and premises, and therefrom over said close to the lane: that afterwards J. D., by deed, dated 12th July, 1849, demised the shop and premises, *with all the appurtenances*, to L. & W. as trustees for a term of years, which it was agreed by the deed should be renewed, and which was afterwards renewed; and that the defendants became and are assignees of the term, and took possession of the shop and premises under the assignment: that after the demise to L. and W., the executors of J. D. demised to S. the said close, subject to said way, and the same afterwards became vested for a term in the plaintiff: that afterwards the defendants during their term, and in their own right, entered the close to use said way, and in using the same broke down part of said wall, which obstructed said way. On demurrer to this plea:

Held, by HARRISON, C.J., that the plea might be read as alleging a defined way, necessary and convenient for the enjoyment of defendants' property before the lease from J. D., constructed across the plaintiffs' close, for the use and enjoyment of defendants' shop, and visible to all persons when the plaintiff acquired title: that so reading the plea, the way might be said

to be an "appurtenance" to defendants' premises, which passed from J. D. by the deed under which defendants claimed; and that the plea therefore was good.

On appeal this judgment was reversed, on the ground that the plea could not be read as alleging an apparent and continuous easement necessary for the proper enjoyment of defendants' premises, without which it would not pass under the deed.

Per Burton, J.—Upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law; easements not continuous or apparent, but used from time to time only, will not.

Per Patterson, J.—A right of way is not such a continuous easement as to pass by implication of law with a grant of the land; only a way of necessity will so pass. A way used by the owner of two tenements over one for access to the other, is not in law appurtenant to the dominant tenement, so as to pass with a grant of it under the word "appurtenances," unless the deed shows an intention to extend the meaning of that word, and to embrace the way, or the grant is of all ways "used and enjoyed," or words are used shewing an intention to include existing ways, in which case a defined existing way will pass.

Ritchie, for plaintiff.

Beaty, Q. C., for defendant.

Erratum.—In the note of *Gilleland* v. *Wadsworth* ante page 84, the names of counsel were omitted: they were, *Maclennan*, Q. C., for appellant; and *Boyd*, Q. C., and *W. Cassels* for respondent.

QUEEN'S BENCH.

Wood et al. v. Chambers.

[Sept. 26.

Guarantee—Construction.

Defendant's son, living at St. Catherines, applied to the plaintiffs, merchants in Hamilton, to supply him with goods, and on the 12th April they wrote to him that they would execute his order if he could get the endorsation of his father. On the 13th the son wrote to them to send the goods, and that he would get his father's endorsation if required. On the 17th the plaintiffs wrote proposing, in view of future business, and to save the trouble of getting an endorsement with each transaction, that the father should give a continuous guarantee. The son on the 19th wrote that he would get this, and urged them to send the goods at once, which they did on the same day, with a form of guarantee for the father to sign. On the 21st the son wrote to his father, who lived at Woodstock, "I am buying some goods" from the plaintiffs, and enclosed the guarantee for his signature. The father, not liking this form, wrote another, as follows: "Woodstock, 20th April, 1875. Gentlemen—In consideration of your supplying my son with what goods he may from time to time require of you this season, on your usual terms of credit, I do hereby guarantee the payment of the same." The defendant, as the Court inferred from the evidence, was not aware when he signed this that his son had already obtained any goods from the plaintiffs. After the guarantee, in May and June, further goods were purchased by the son.

Held, that the guarantee applied only to the goods purchased after it, not to those previously furnished.

McKelcan, Q.C., for plaintiff.

Osler for defendant.

Devlin v. Hamilton and Lake Erie Railway Company.

[Nov. 27.

R. W. Co.—Train passing along a street—Houses injuriously affected—Right to compensation.

A railway company was permitted by the corporation to run their track along Cherry street in the city of Hamilton, which was only thirty feet wide. The plaintiff, owning a brick cottage and frame house on the street, complained that the trains passing caused the houses to vibrate, and the plaster to fall off the walls, and alleged loss of tenants thereby; but the evidence as to any structural injury caused by the railway was contradictory, and the Court held that it was not sufficiently made out.

Held, affirming the judgment of Hagarty, C.J., that the plaintiff was not entitled to compensation under the Railway Act.

McMichael, Q.C., for appeal.

C. Robinson, Q.C., and *Walker*, contra.

Watson v. Charlton.

[Dec. 29.

Order to hold to bail—Sufficiency of affidavits—Rule nisi.

In order to support an order to hold defendant to bail, the plaintiff need not disclose in his affidavit the name of the persons on whose information he founds his belief that defendant is about to leave the province, where he files also other affidavits, stating facts which would justify such belief. In that case, it is the same as if the plaintiff had stated that these deponents

had informed him of the facts stated in their affidavits.

A rule *nisi* to set aside the order for such alleged insufficiency in the plaintiff's affidavit must point out the objection specifically.

H. Cameron, Q.C., for plaintiff.
Watson for defendant.

McBrian et al. v. Water Commissioners of the City of Ottawa.

[Sept. 15

35 Vict., cap. 80, sec. 41—Construction of.

The 35 Vict. cap. 80, sec. 41, incorporating the defendants, as amended in 36 Vict. cap. 104, sec. 17, O., provides that "all work under the said companies shall be performed by contract, excepting the laying of the water pipes, and such other works as in the opinion of the engineer of the said companies can be more profitably performed by day work." *Held*, that the words "by contract" did not necessarily mean by contract under seal, so as to relieve the defendant from liability for work done upon an executed parol contract.

Osler for plaintiff.
S. Richards, Q.C., for defendant.

Rupert et al. v. Johnston, et al.

[Sept. 26.

Donatio mortis causa—Gift inter vivos—Delivery.

B., who died in 1874, had made a will in which there was a devise to the plaintiff, his illegitimate daughter; but this having given offence to his family he destroyed it and made another, and at the same time signed a promissory note, payable to the plaintiff, for $2,000. He placed this note in a pocket book, where it remained till after his death, but shortly before his death he shewed it to a witness, and said it was to be paid after his death, and then handed it with the pocket book to the witness, but afterwards took them back. He told this witness that he would talk more about it to her another time, and asked her to tell P., his legitimate daughter and his executrix, that he had shown the witness the note, which the witness did, and told the testator that she had done so. It was proved also that he said he had made provision for the plaintiff.

Held, that the plaintiff could not recover, for the note could not be claimed by her either as a *donatio mortis causa* or as a gift *inter vivos*, there having been no delivery of it by the testator.

Quære, whether such a note may, by manual delivery, be the subject of a gift.

Wallbridge, Q.C., for plaintiff.
Britton, Q.C., for defendant.

Gearing v. Nordheimer.

[Sept. 26.

Building agreement—Omission to sign specifications—Right to sue on quantum meruit.

The plaintiff agreed in writing, on the 19th February, to build a house for the defendant according to the plans and specifications of one R., with alterations made by I., for $25,000. Afterwards some alterations were agreed upon, and on the 30th April a contract was executed by plaintiff and defendant by which the plaintiff was to build the house for $26,596, and this contract recited that the plaintiff had agreed to do all the work required according to certain plans and specifications prepared by R., with certain suggestions and amendments made by I., and signed by the plaintiff, subject to the various stipulations and conditions mentioned in the contract. The plans were signed by the plaintiff, but not the specifications; but he finished the building according to the specifications prepared, and from time to time obtained certificates for payment from the architect for the work executed as under the contract, in accordance with its provisions, by which the money was to be paid on such certificates, no extra work was to be paid for without a written order, and in the event of any dispute the architect was to be the sole and final judge.

Held, that the plaintiff's omission to sign the specifications could not entitle him to set aside the contract as not complete, and to claim for the work done as upon a *quantum meruit*, without the architect's certificates.

C. Robinson, Q.C., for plaintiff.
H. Cameron, Q.C., for defendant.

Chaffey v. Schoolky.

[Nov. 29.

Vessel—Unseaworthiness—General average.

The defendant's schooner was engaged to carry a cargo of timber from Spanish River to Chippawa. She left Spanish River with the timber on the 15th October, and anchored on that day at Bayfield Sound, leaking badly, where she remained till the 10th of November, and was then towed by a tug to Sarnia. There she got a steam pump, and with it on board was towed to the Welland canal, where she arrived on the 25th November, and being broken up the cargo

had to be unloaded. The defendant refused to give up the timber, unless, in addition to the freight, the plaintiff would pay his share for general average of (1) the expenses incurred for charges of the tug, $1200; (2) use of hawser, $50; (3) use of steam pump, $315; (4) telegrams, protest, adjustment, $25; (5) extra help discharging, $120.

Held, that if the vessel had been seaworthy the first, second and fifth items would not have been chargeable; and that the third might be; but

Held, also, that the evidence set out below shewed the vessel to have been unseaworthy at the commencement of and during the whole voyage, and that the expense was occasioned thereby; and that the defendant therefore had no claim.

Miller for plaintiff.
Delamere for defendant.

Sinclair v. Canadian Mutual Fire Insurance Company.

Mutual Insurance Co.—False statement as to title—Concealment of encumbrance—36 Vict. cap. 44, sec. 36, O.

The plaintiff, in his application for insurance with defendants, a mutual insurance company, answered "Yes" to the question, "Does the property to be insured belong exclusively to you?" and to the question, "If encumbered, state to what amount," he made no answer. The defendant's agent, who took the application, said the plaintiff told him there was a mortgage for $100 on the building, which he was about to have discharged, and that he, the agent, therefore thought it unnecessary to insert it in the application, and gave no notice of it to the company. The plaintiff said the agent filled up the application, which he signed without reading it, and that he told the agent of the mortgage, but did not say that he was going to remove it.

Held, that there was no false statement as to title; and that there was no concealment as to the encumbrance, for the omission to mention it was sufficiently explained; and that the defendants, after the issue of the policy on the application, and after the fire, could not take advantage of the omission as avoiding the policy under 36 Vict., cap. 44, sec. 36, O.

Quære, whether the "false statement" or "concealment" mentioned in that section must not be fraudulent, in order to avoid the policy.

Richards, Q.C., for plaintiff.
Duff for defendant.

Regina v. Nichol et al.

[August 31.

Summary conviction—Notice of appeal—33 Vict. 27 D.

It is not essential that the notice of appeal under 33 Vict. cap. 27 D., from a summary conviction, should be signed by the party appealing. A notice, therefore, "that we, the undersigned D. N. and C. N." of, &c., following the form given by the Act in other respects, but not signed, was held sufficient.

Lount, Q.C., for the prosecution.
McCarthy, Q.C., for Nichol.

Silverthorne v. Lowe.

[Oct. 17.

Covenant for title—Pleading.

A declaration on a covenant against encumbrances by defendant, his wife, or any one claiming under them, alleged as a breach that at the time of making said covenant a large sum was in arrear for taxes duly imposed, without shewing that they accrued while defendants owned the land or were caused by his acts. *Held*, bad.

J. K. Kerr, Q.C., for plaintiff.
McMichael, Q.C. for defendant.

Kerr et al. v. Stripp, et al.

[Dec. 29

Married woman—Liability of—35 Viet. cap. 16, O.

A married woman in August, 1874, gave a promissory note with her husband to the plaintiff, for money due by him, which they accepted on the representation, which was true, that she had separate estate, the only consideration being the forbearance of the husband's debt.

Held, that she was liable, under 35 Vict. cap 16, O.

Martin, Q.C., for plaintiff.
MacMahon, Q.C., for defendant.

Annie M. Hutchinson et al. v. Beatty.

Free grant territory—Sale of timber by locatee—31 Vict. cap. 8, 37 Viet. cap. 23, O.

Land within the free grant territory was located on the 12th of August, 1870. On the 2nd of April, 1872, the locatee sold to defendant all the pine and other timber thereon, stipulating that ten years should be allowed for taking it off, and defendant paid the purchase money in full. The patents for the lands issued in 1876, and the defendant afterwards cut timber, for which the patentees brought trespass.

Held, under 31 Vict. cap. 8, and the order in Council of 4th October, 1871, confirmed by 37 Vict. cap. 23, O., the locatee had a right to make the sale: that no limitation as to the time within which the timber should be removed could be implied from these statutes; and that the plaintiff therefore could not recover.

McCarthy, Q.C., for plaintiff.

Rose for defendant.

FISKEN AND GORDON v. MEEHAN.

[Jan. 2, 1877.

Promissory note—Accommodation maker and indorser—Relation of suretyship—Consideration.

Action on a note for $1500, dated 25th February, 1872, made by defendant payable to the order of S., and alleged to have been endorsed by S. to the plaintiffs.

It appeared that one M., on the 17th January, 1872, had given his bond to the assignee in insolvency of S. conditioned, if S. should fail to pay forty-three cents in the $ by the 10th July, to pay to the assignee $500, or so much as should be required to make up the deficiency. S. got the defendant to make this note for his accommodation, and got F. to endorse it afterwards, in order to give it to M. as security against his bond, which he did. M. having been sued on this bond, compelled F. to pay him the amount of the note, and F. and his partner then sued defendant as maker.

The learned Chief Justice of the Common Pleas, who tried the case without a jury, found that defendant, when he signed the note, understood from S. that F., one of the plaintiffs, would endorse as co-surety; and that defendant would be liable only for half the amount; but that F. knew nothing of this, but endorsed in the ordinary way, considering that defendant would be liable to him for the whole.

Held, WILSON, J., dissenting, that the relationship of co-sureties between F. and defendant was not established, so as to prevent the plaintiffs from recovering from defendant more than half the amount of the note.

Per WILSON, J.—F. and defendant each knew that the other was a surety for S., and that being so, there was the relation of suretyship between them for the common debtor.

Ianson v. *Paxton*, 23 C. P. 439, and its effect as a judgment of our Court of Appeal, commented upon.

Held, also, that M. held the note on a good consideration as between himself and the other parties thereto.

Ferguson, Q.C., for plaintiff.

Hodgins, Q.C., for defendant.

ABRAHAMS v. AGRICULTURAL MUTUAL ASSURANCE ASSOCIATION.

[Jan. 2.

Fire policy—Non-occupation of premises.

A fire policy, granted to the plaintiff on a dwelling house in a town, contained the following condition: "Unoccupied dwelling houses with the exceptions undermentioned, are not insured by this association, nor shall it be answerable for any loss by fire which may happen to, in, or from any dwelling-house while left without an occupant or person actually residing therein. The temporary absence of a member or his family, however, none of the household effects being removed, is not to be construed into non-occupancy. And this condition is not construed to apply to the temporary non-occupation of small dwellings for the accommodation of hired help on a farm, the main dwelling on the same continuing to be occupied. But the main dwelling house must not be unoccupied for longer than forty-eight hours at any one time."

The plaintiff lived several miles from the house, which was leased to a monthly tenant, who had removed his goods within forty-eight hours before the fire, and no one had resided in the house for ten days before. The fire took place on the 10th September, and the tenant's month was up on the 24th. He was in arrear for rent, for which his goods had been distrained; but the plaintiff, who had a person ready to take possession, did not suppose that the tenant would leave before his month was up.

Held, that the exception as to forty-eight hours applied only to dwellings on a farm; that the condition which required an actual residence of the occupant was broken; and that the plaintiff could not recover.

Held, also, that a demand of the claim proper and proof of loss, without reference to this condition, could not be construed as a waiver of it:

Canada Landed Credit Co. v. *The Canada Agricultural Ins. Co.*, 17 Grant 418, departed from on this point.

No such waiver having been set up at the trial, which took place without a jury, *quære*, as to the propriety of allowing it to be urged in term.

D. B. Read, Q.C., for plaintiff.

McMillan, for defendant.

SHANNON v. GORE DISTRICT MUTUAL FIRE INSURANCE COMPANY.

[Jan. 2.

Insurance—Double Insurance—Same agent for both companies—Estoppel.

The plaintiff went to one Morris, who was local agent at Barrie for defendants, and for the Hastings Mutual Insurance Company. They went together to one M., who filled up two applications for insurance, which were signed by the plaintiff, one for insurance with defendants on his grist mill, and the other for insurance with the Hastings Company on fixed and moveable machinery in the mill. The agent, thinking the former insurance was on the building only, and the latter on the machinery only, did not inform defendants of the other insurance, and the application to defendants stated that there was no other insurance on the property.

Held, that there was a further insurance on part of the property insured by defendants; but

Held, also, WILSON, J., dissenting, that the defendants, under the circumstances, could not set it up to defeat the plaintiff's claim, defendants' agent having prepared the application with a full knowledge of the facts.

McCarthy, Q.C., and *Strathy*, for plaintiff.

J. H. Cameron, Q.C., for plaintiff.

NOTES OF RECENT DECISIONS.

QUEBEC.

BREWSTER ET AL., *Appellants;* CHAPMAN ET AL. *Respondents.*

[20 L.C. Jur. 295.

Supreme Court—Right of Appeal.

Held, 1. That the right to appeal to the Supreme Court does not exist, in respect of any judgment rendered prior to the coming into force of the Act creating that Court.

2. That where a record has been remitted by the clerk to the Court below, in consequence of the proper certificate not being lodged within six months after the granting of an appeal to Her Majesty in Her Privy Council, that the appeal had been lodged in the Privy Council, this Court cannot order the Prothonotary of the Court below to return the record.

IN RE SIMMONS ET AL.

[20 L.C. Jur. 296.

Insolvent Act—Partnership.

Held, That the creditor of an insolvent cannot claim upon the partnership of which the insolvent was a member for the price of goods sold to the insolvent before his partnership, upon the ground that the partnership afterwards got the benefit of the purchase.

WOODWARD v. ALLAN ET AL.

[21 L.C. Jur. 17.

Carrier by water—Steamship—Loss of luggage.

Held, That a limitation of liability by a carrier put on a passenger's ticket, will not bind the passenger without proof of notice to him of such limitation, apart from the words on the ticket.

FULTON v. LEFEBVRE.

[21 L.C. Jur. 22.

Insolvent Act—Acquiescence.

Held, That a party who has for upwards of six months acquiesced in the proceedings taken against him under the provision of the Insolvent Act, 1875, cannot afterwards question the jurisdiction of the Court under said Act.

NEW BRUNSWICK.

THE QUEEN v. ARTHUR O'LEARY.

[3 Pugsley's Rep. 265.

Arrest under warrant issued by Justice of the Peace—Assault on officer—Summary conviction for assault—Prayer to proceed summarily—Necessity for—Presumption—Warrant of commitment.

A Justice of the Peace has no jurisdiction to try an assault summarily unless it is given him by Statute, and he must strictly pursue the authority given; and in order to give him jurisdiction under the Statute of Canada 32-33 Vict. cap. 20, sec. 43, it is necessary that the complainant should request him to proceed summarily; and this request should be made at the time of the complaint.

Where the proceedings did not show whether

such request was made or not, but it was proved that the complainant was present at the return of the summons and gave evidence against defendant, if any intendment could be made, it might be presumed complainant had made such request.

If a warrant of commitment, issued by a Justice of the Peace, is good on its face and the Magistrate had jurisdiction in the case, it is a justification to a constable to whom it is given to be executed, and a person resisting him is guilty of an assault; and where the warrant was based on a conviction for an unlawful assault, it is not necessary, in order to make the warrant legal and a justification to the constable, that it should be stated in the conviction and warrant that the complainant had requested the Magistrate to proceed summarily.

Quære. Whether a conviction by a Justice for an unlawful assault should show a request to proceed summarily.

A conviction for an unlawful assault may adjudge defendant to be imprisoned in the first instance, under sec. 43 of the 32-33 Vict., cap. 20.

It is not necessary, before a defendant, convicted of an assault, is imprisoned, that he should be served with a copy of the minute of conviction.

UNITED STATES REPORTS.

SUPREME COURT OF RHODE ISLAND.

MARY O'ROURKE v. MARY SMITH.

Easement.

M. C. owning a tract of land bounded N. by a street, conveyed to D. the west portion, whereon was a well, reserving a right to use the well by the words "excepting a privilege to the well of water on said lot which I reserve for the use of my said homestead estate," this homestead estate being the remainder of the tract. Subsequently M. C. devised to J. in fee simple the land between the house and the lot conveyed to D., together with a tenement in the house, and to S. the rest of the homestead estate. For a long period, but not for the time required to gain an easement by prescription, all the occupants of the homestead estate had crossed the land between the homestead and D.'s lot on their way to the well. In trespass *quare clausum* brought by the grantees of J. against S., *held*, that the way across J.'s lot could not be claimed as a way of strict necessity. *Held*, further, that the way could not be implied from the circumstances of the case as one reasonably necessary.

Query. Whether the grant of a way existing *de facto* can be implied except in cases of strict necessity.

Semble, that the claimant of such grant must be required to show that without the way he will be subjected to an expense excessive and disproportioned to the value of his estate, or that his estate clearly depends for its appropriate enjoyment on the way, or that some conclusive indication of his grantor's intention exists in the circumstances of his estate.

[16 Am. Law Reg. 205.]

Exceptions to the Court of Common Pleas.

This was an action of trespass *quare clausum fregit*, to which the defendant pleaded in justification a right of way. The action was tried in the Court of Common Pleas to the court, and judgment rendered for the defendant. It came up to this court by bill of exceptions, the exceptions being accompanied by a statement of facts proved on the trial; in substance as follows:—

The plaintiff and the defendant were owners of adjoining lots fronting on Weeden street, in the former town of North Providence, now Pawtucket. The two lots were formerly part of a larger estate belonging to Michael Coyle. On the 11th May 1866, Coyle sold the part not covered by the two lots to P. G. Delaney. On the part so sold there was a well. In the deed to Delaney, Coyle reserved a right to use the well in the following words, viz.: "Excepting a privilege to the well of water on said lot, which I reserve for the use of my said homestead estate." The two lots now owned by the plaintiff and the defendant were embraced in what was then the "said homestead estate." Michael Coyle lived there after the sale till his death. He died after May 16th 1866, leaving a will bearing date of that day, which was approved November 5th 1866. In the will he devised the homestead estate to his wife for life, and, after her decease, to his son, John Coyle, and daughter, Mary Smith, the defendant, in fee simple, devising to John the tenement occupied by himself, with the lot of land westerly from the house, being the lot now owned by the plaintiff, and to Mary Smith the basement and attic tenements, with the share of land belonging to the same on the easterly side thereof, being the lot which she now owns. The widow of Michael Coyle died many years ago. The part of the homestead estate devised to John Coyle came to the plaintiff by mesne conveyances previous to June 17th 1872. The part devised to Mary Smith was in her possession June 17th 1872. The lot now owned by the plaintiff is nearest the land sold to Delaney. A path leading from the defendant's lot to the well crosses the plaintiff's lot. The tenants and occupiers of all portions of the homestead house had, for some years (but not twenty years), both

before and after the death of Michael Coyle, used the well, and the path to go to and from the well, when they saw fit. The plaintiff built a fence across the path on the line between his lot and the defendant's, and on the line between his lot and the Delaney lot. On the 17th June 1872, the defendant removed the lengths of fence stretching across the path, as being obstructions to her right of way along the path to and from the well, this removal being the trespass complained of.

The statement showed, in addition to the facts above stated, that both parties could go to the well in another way, by first passing directly from their own lots into Weeden street, then down Weeden street to the Delaney lot, and across the Delaney lot; but this was not the accustomed way—was more burdensome to the Delaney lot, and it was not known that the owners of the Delaney lot would consent to its use.

The opinion of the court was delivered by

Durfee, C. J.—The plaintiff contends that Michael Coyle, being the absolute owner of the estate, had the right to dispose of the lot which he now owns unencumbered by the way; that Michael did so dispose of it when he devised it to John Coyle in fee simple, and that under John Coyle he holds it unencumbered.

The defendant contends that by force of the reservation in the deed to Delaney, the privilege of the well became appurtenant to the homestead estate and to every part of it, and consequently to the part which she now owns, and that inasmuch as she cannot use the privilege without the way, she is entitled to the way, either as a way of strict necessity, or as a way which, being reasonably necessary, may be implied from the circumstances.

1. We do not think that the defendant is entitled to the way as a way of strict necessity. Ordinarily, such a way is implied as incident to an express grant upon the presumption that when a man grants a thing he intends likewise to grant that without which the thing granted cannot be enjoyed. The privilege of the well has not been expressly granted or devised. If it passed to the defendant it passed to her as appurtenant to the estate which was devised to her, and that, too, without any mention, even in the most general way, of appurtenances. Now it will not be denied that Michael Coyle had the power to devise the estate without the privilege. He might have done so in express terms. Or, again, he might have expressly devised the intervening lot unencumbered by the way, in which case the privilege, if dependent on the way, would be extinguished by implication. The devise of the intervening lot in fee simple was *prima facie* equivalent to such a devise; for *prima facie* it gave the devisee as perfect an estate as the devisor himself had, and the devisor himself had an estate so unencumbered.

2. Is the plaintiff entitled to the way as a way which, being reasonably necessary, may be implied from the circumstances of the estate?

The law in regard to the creation of easements by implication where estates which have been united in a single ownership are severed by deed, will, or partition, is elaborately discussed in the third and last edition of Washburn on Easements and Servitudes, published in 1873. The cases there collected and collated are somewhat discordant, but they are very generally to the effect that where the easement or *quasi* easement is continuous, apparent, and reasonably necessary to the beneficial enjoyment of the estate for which it is claimed, a grant thereof will be implied. The rule applies especially in favor of easements of air and light, lateral support, partition walls, drains, aqueducts, conduits, and waterpipes or spouts, all these being continuous easements technically so called—that is to say, easements which are enjoyed without any active intervention of the party entitled to enjoy them. Ways are not in this sense continuous easements, but discontinuous or noncontinuous, being enjoyed only as they are travelled. This distinction, however, between ways and the other easements mentioned has not been uniformly regarded, and there are cases, especially in Pennsylvania, in which it has been held that ways which are visibly and permanently established on one part of an estate for the benefit of another will, upon a severance of the estate, pass as implied or constructive easements appurtenant to the part of the estate for the benefit of which they were established: *Kieffer* v. *Imhoff*, 26 Penna. St. 438; *McCarty* v. *Kitchenman*, 47 Id. 239; *Phillips* v. *Phillips*, 48 Id. 178; *Pennsylvania Railroad Co.* v. *Jones*, 50 Id. 417; *Cannon* v. *Boyd*, 73 Id. 179; *Thompson et al.* v. *Miner*, 30 Iowa 386; *Hutteneier* v. *Albro*, 2 Bosw. 546; affirmed, 18 N. Y. 48. But in New Jersey the doctrine was held to be inapplicable to ways: *Fetters* v. *Humphreys et al.*, 19 N. J. Eq. 471. And there are many English cases in which the application of the doctrine to ways has been denied: *Pheysey et ux.* v. *Vicary*, 16 M. & W. 484; *Whalley* v. *Thompson et al.*, 1 Bos. & Pul. 371; *Worthington* v. *Gimson*, 2 El. & E 618;

Dodd v. *Burchell*, 1 H. & C. 113; *Polden* v. *Bastard*, 4 B. & S. 258, and affirmed, Law Rep. 1 Q. B. 156; *Thompson* v. *Waterlow*, Law Rep. 6 Eq. 36; *Langley et al.* v. *Hammond*, Law Rep. 3 Exch. 161; and see *Pearson* v. *Spencer*, 1 B. & S. 571, and affirmed, 3 B. & S. 761; *Daniel* v. *Anderson*, 31 L. J. N. S. 610. cited in Washburn on Easements, 3rd ed. 59.

In *Dodd* v. *Burchell*, 1 H. & C. 113, the owner of an estate had conveyed a part of it upon which there was a way which he claimed to be entitled to by implied reservation, upon the ground that there had been a continuous user of it for a number of years, and that without it the land could not be reasonably enjoyed. The Court of Exchequer decided against the claim. Chief Baron POLLOCK said: "There is a wide difference between that which is substantial, as a conduit or watercourse, and that which is of an incorporeal nature, as a right of way. In my opinion if we were to adopt the principle contended for, it would be a most dangerous innovation of modern times. The law seems to me particularly careful and anxious to avoid important rights to land being determined by parol evidence and the prejudices of a jury."

In *Worthington* v. *Gimson*, 2 El. & E. 618, Justice CROMPTON uses the following language: "It is said that this way passed as being an apparent and continuous easement. There may be a class of easements of that kind, such as the use of drains or sewers, as part of the necessary enjoyment of the severed property. But this way is not such an easement. It would be a dangerous innovation if the jury were allowed to be asked to say from the nature of a road whether the parties intended the right of using it to pass."

In *Polden* v. *Bastard*, 4 B. & S. 258, the owner of two adjoining estates devised them to different persons. There was on one of them a well and pump to which the tenant of the other was, when the will was made, and for some time before had been, in the habit of resorting for water, with the knowledge of the testatrix, using a foot-way from his dwelling house into the yard where the pump was. He had no supply of water on his own premises, but might have obtained it there by digging a well fifteen or twenty feet deep. The testatrix devised the premises "as now in the occupation" of the tenant. The devisee sold to the defendant, who claimed the right to use the pump. The claim was not sustained. ERLE, C. J., said: "There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The law recognises this distinction, and it is clear that upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shows an intention that they should pass. The right to go to a well and take water is not a continuous easement, nor is it an easement of necessity."

We share the feeling expressed in these cases in regard to making rights in real estate dependent upon facts and circumstances which may be differently interpreted by different minds. If the grant of a way, existing previously *de facto*, can be implied from anything short of necessity, we think at any rate that the party claiming the way should be required either to show, as in *Pettingill* v. *Porter*, 8 Allen 1, that without the use of the way he will be subjected to what, considering the value of the granted estate, will be an excessive expense; or to show, as in *Thompson et al.* v. *Miner*, 30 Iowa 386, that there is a manifest and designed dependence of the granted estate upon the use of the way for its appropriate enjoyment, or to adduce some other indication equally conclusive; and see *Worthington* v. *Gimson*, 2 L. & E. 618; *Leonard* v. *Leonard*, 7 Allen 277, 283.

In the case at bar the legal grounds of the decision made in the court below are not explicitly stated, but only the decision itself, and the facts on which it was based. The question for us, as submitted to us in argument, is whether, the facts being as stated, the decision was right. We think it was not. It does not appear that the defendant's estate is dependent on the Delaney well for its water supply, nor that the defendant has not a well of her own, or could not make a well for herself at moderate cost. And in regard to the way, it does not appear to have been established in the lifetime of Michael Coyle so definitely as to show a *decision* on his part to subject the part of the estate now owned by the plaintiff to a *quasi* servitude in favor of the other part—as, for instance, he might have done by inclosing the way with a fence, which should connect it with the part now owned by the defendant. Indeed we do not see that the case at bar differs materially from *Polden* v. *Bastard*, 4 B. & S. 258, above cited; for, as we have seen, the privilege of the well not having been expressly devised, we cannot infer the way from the privilege, but must rather presume an extinguishment of the privilege unless the way may be otherwise im-

plied. If the facts are not such that the way may be otherwise implied, the *prima facie* right of the plaintiff to have his estate unencumbered by the way must prevail. We think the way cannot properly be implied from the facts which are stated. We therefore sustain the exceptions and grant the plaintiff a new trial.

Exceptions sustained.

(Note by Editor of *American Law Register.*)

After reading the above opinion one is impressed with the thought that there is much to be said in favor of the decision of the court below. It might well be argued that as the use of the well was reserved equally for the benefit of all portions of the "homestead estate" at the time of the sale to Delaney and the testator, during his ownership of both sections of land, having impressed upon the portion owned by the plaintiff a *quasi* servitude or easement, for real servitude or easement, of course, could not be, the land servient and dominant belonging to the same person, and that fact being presumably known to the devisees, the son and the daughter of the testator probably his heirs, the land would naturally pass to the devisees, with the respective portions charged and benefited, as they were in the testator's lifetime; unless something should appear in the devise, manifesting the intention of the testator to change the character of the enjoyment of the land; and that the devise in fee simple is not enough *per se* to manifest such intention since the enjoyment of an estate in fee simple is by no means inconsistent with its enjoyment subject to an easement, and as the will is to be taken as a whole and the intention of the testator collected therefrom (3 Burr. 1541, 1581; *Ruston* v. *Ruston*, 2 Dall. 244), if the devise to plaintiff's grantor "gave the devisee as perfect an estate as the devisor himself had and that was an estate so unencumbered;" so the devise to the defendant gave her "as perfect an estate as the devisor himself had" and that was an estate with the advantage of the use of the well annexed thereto and solemnly reserved to it, and that as to the use of the well, the way, long used by the testator, was necessary, as no presumption could be raised that the owner of the Delaney lot would permit a new and more burdensome way to be laid out upon his premises—as he certainly could not be compelled to—the way having been once located, the power of location was gone for ever, and in this case, the effect would be not merely to change the way but to create an additional and distinct one.

The English authorities seem to uphold the decision and to show a tendency to restrain ways by implication to those of strict necessity (though occasionally straining the word "necessity" and sometimes taking a more liberal view as to the character of the necessity), and by no means to favor the granting of ways by implication as original rights, or their revival after extinction by unity of possession, and, in view of the assumed non-continuous character of ways, not to apply to that species of easements the rule laid down in Gale on Easements 40. "Easements which are apparent and continuous are not merely those which *must* necessarily be seen, but those which *may* be seen or known on a careful inspection by a person ordinarily conversant with the subject."

In *Whalley* v. *Thompson*, 1 B. & P. 371 (1799), it was held that a way extinguished by unity of possession did not revive on severance. In *Plant* v. *James*, 5 B. & Ad. 794 (1833), Lord DENMAN said, "If the grantor wishes to revive or create such a right he must do it by express words or introduce the words therein used and enjoyed "in which case easements existing in point of fact though not existing in point of law would be transferred to a grantee."

In *Glave* v. *Harding*, 27 L. J. (N. S.) Exch. 286 (1858), Baron BRAMWELL appears to be disposed to apply a somewhat more liberal rule to ways and to grant that there might be such a thing as a continuous way. "It [a lease] did not grant the right in terms and the only way in which it could grant it was that the condition of the premises, at the time when the lease was granted, showed that it was intended that the right of way should be exercised on the principle I have adverted to, that by the devolution of the tenements a right of way to a particular door or gate would, as an apparent or continuous easement, pass to the owners and occupiers of both of them. But I think that the way in question is not a continuous and apparent easement within the principle of law * * * I found my opinion upon the condition of the premises at the time the lease was granted."

In most of the English cases, there were other outlets besides the one claimed as a way by implication and as reasonably necessary, and therefore they do not exactly cover the point of the principal case; indeed in *Pheysey* v. *Vicary*, 16 M. & W. 484, it was doubted by ALDERSON, B., whether a new trial should not be granted to try whether the way claimed were not necessary to the *convenient* occupation of the house, although there was another outlet from the premises. In *Dodd* v. *Burchell*, there was an additional way.

Necessity has in some cases been given a more liberal interpretation. In *Pyer* v. *Carter*, 1 H. & N. 972, it was said that by necessity should be understood the necessity at the time of conveyance and as matters then stood without alteration. This case which was not that of a way, has run the gauntlet of criticism and it is questionable how far it is authority beyond its own facts. In *Ewart* v. *Cochrane*, 8 Jur. 925 (1861), Lord CAMPBELL said: "When two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used and was necessary for a comfortable enjoyment of that part of the property which is granted shall be considered to follow from the grant, if there be the usual words of conveyance."

Polden v. *Bastard*, 4 B. & S. 258, does not materially differ from the principal case, except perhaps in the particular, that in the English case, there was evidence that water could be obtained on the premises of the defendant by digging a well of a certain depth, but this distinction can be easily resolved to a mere question of the burden of proof, which Chief Justice DURFEE thinks should rest upon the person claiming the easement.

In the United States, in Massachusetts, in the case of *Pettingill* v. *Porter*, 8 Allen 1 (1869), it was left to the jury to say whether there would be unreasonable labour and expense in constructing another way, and in the Supreme Court, CHAPMAN, J., said: "The word 'necessity' cannot reasonably be held to be limited to physical necessity. If it were so, the way in question would not pass with the land if another way could be made by any amount of labour or by any possibility."

In *Fetters* v. *Humphrey*, 3 C. E. Green (Ch.) 262 (1867), ZABRISKIE, Ch., remarked, "If until the time of severance of title there has been a way, or drain, or other matter in the nature of an easement, from one of the parcels through the other, established and kept up by the common owner of both, and necessary for the

beneficial enjoyment of the dominant parcel, then an easement is created by such sale, devise or partition. Discontinuous easements not constantly apparent are only continued or created when they are necessary, and that necessity cannot be obviated by a substitute constructed on or over the dominant premises."

In Pennsylvania, the doctrine, which seems based rather in legal refinement than on practical utility, that ways are not continuous easements, and that, therefore, the same rule as to visibility and permanency, is not to be applied to them as to other easements, is not regarded as law, and more liberality has been shown in sustaining ways than elsewhere. In *Kiefer* v. *Imhof*, 2 Casey 438 (1856), the right to an alley-way through the servient in favor of the dominant portion of land, which two portions had formerly belonged to one proprietor and had been sold at sheriff's sale, with no mention of the right of way, was sustained, although it was not a way of necessity. Lewis, C. J., said, "It is obvious, therefore, that if the dominant and the servient tenements become the property of the same owner, the exercise of the right, which in other cases would be the subject of an easement, is during the continuance of his ownership, one of the ordinary rights of property only, which he may vary or determine at pleasure. The inferior right of easement is merged in the higher title of ownership: 2 Bing. 83; 9 Moore 166; 3 Burst. 340. * * * Upon a subsequent severance of the estate by alienation of part of it, the alience becomes entitled to all continuous and apparent easements which have been used by the owner, during the unity of the estate and without which the enjoyment of the several portions could not be fully had. * * * The owner may, undoubtedly, alter the quality of the several parts of his heritage, and if he does so and afterwards alien one part, it is but reasonable that the alterations thus made, if palpable and manifest and obviously permanent in their nature, shall go to the purchaser in the condition in which they were placed and with the qualities attached to them by the previous owner." The learned judge also approved of the rules of the civil law with reference to servitudes and cited Pardessus, *Traite des Servitudes*, § 288, which (as given in Gale, p. 50) is, "If afterwards these heritages should become the property of different owners, whether by alienation or division amongst his heirs, the service which the one derived from the other and which was simple 'destination *du pue de famille*,' as long as the heritage belonged to the same owner, becomes a servitude as soon as they pass into the hands of different proprietors."

In *Phillips* v. *Phillips*, 12 Wright 186 (1864), Thompson, J., said: "In this, although we do not recognize a way of necessity, we see the reason for the creation of this private way (*i. e.*, that it was the only convenient way), why it was opened, kept open and used by the owner and his family until his death, and the same condition of things, as regards the surroundings continuing, we may presume that it must have been the intention of the owner that it should remain permanent, inasmuch as he made a final disposition by will of both the dominant and servient portions, without the slightest hint of a wish that their relations to each other should be changed." It will be noticed that the court gave a different face to the devise in fee from that given by the Rhode Island court, and as its opinion is derived from a consideration of the whole will, it would seem to be in better accord with the usually received principles of interpretation.

Pennsylvania Railroad Co. v. *Jones*, 14 Wright 417 1865), recognises and follows the foregoing case.

In *Overdeer* v. *Updegraff*, 19 P. F. Smith 119 (1871), which was the case of an alley-way, William, J., said: "But if there had been no express reservation of the right to the use of the alley in the conditions of sale, and in the deed delivered to the purchaser, the latter would have taken it subject to the servitude imposed upon it by the decedent for the use and benefit of the occupants of the adjoining lot. It was a continuous and apparent easement and the law is well settled that in such a case a purchaser, whether at private or judicial sale, takes the property subject to the easement."

In *Cannon* v. *Boyd*, 23 P. F. Smith 179 (1873), where an alley-way was claimed over a property which had been sold at sheriff's sale, on behalf of a property sold at the same sale, both properties having belonged to the same owner, Lynd, J., in the District Court, had charged: "The only question in this case is, what was the condition of these two properties at the time of the sheriff's sale? If the condition of the properties was such as to indicate that the occupants of property now owned by the plaintiff used the alley in question and had a right to do so, the verdict should be for the plaintiff." This was affirmed by the Supreme Court.

It will be seen by this short review of cases that there is a considerable conflict of authority, leading to no little uncertainty, but that on the whole it can hardly be said of ways by implication that they are favorites of the common law.

H. B., Jr.

DIGEST.

DIGEST OF THE ENGLISH LAW REPORTS

FOR AUGUST, SEPT., AND OCT., 1876.

From the American Law Review.

Action against Public Officer.—*See* Frivolous Suit.

Annuity.—*See* Residuary Legatee.

Arbitration Clause.—*See* Covenant.

Bailment.

1. Plaintiff left two parcels worth £60 with a servant of the defendant railway company, paid for their deposit without declaring their value, and received therefor a ticket headed "Luggage and cloak office," and bearing on its face, in plain type, a reference to conditions on the back. Among these conditions was one stating that the company would not be responsible for more than £5 value, unless the extra value was declared and paid for, and that "the company will not be responsible for loss of or injury to articles except left in the cloak room." Plaintiff knew there were conditions on the ticket, but did not know what they were. The parcels were left by the servant in an exposed place, instead of putting them in the "Luggage and cloak office," referred to on the ticket, and a thief made off with them. *Held*, that the plaintiff could not recover although the parcels were not put into the cloak-room, because the conditions on the ticket were binding, and the plaintiff must be held to have knowledge of them.—*Harris* v. *The Great Western Railway Co.*, 1. Q. B. D. 515.

2. Plaintiff left his bag, worth £24 12*s.*, at the 'cloak-room' of defendant's station, and received a ticket therefor, on the face of which was the date and number of it, and the time of opening and closing the cloak-room, and the words "See Back." On the back it was stated that the company would be responsible only to the amount of £10. There was also a notice to this effect hung in the cloak-room in a conspicuous place. The jury found as a fact that the plaintiff did not read his ticket, and did not know of the condition on the back, and that, as a reasonably careful man, he was under no obligation to make himself aware of said condition. *Held*, that the company was liable for the value of his bag.—*Parker* v. *The South-eastern Railway Co.*, 1 C. P. D. 418.

BANKER.—*See* BILLS AND NOTES, 3.

BASE FEE.—*See* TENANT IN TAIL.

BILL OF LADING.

By a bill of lading, 306 packages of tea, shipped on board the *Medway* at London for Montreal, for the appellants, were "to be delivered from the ship's deck where the ship's responsibility shall cease at the port of Montreal . . . unto the Grand Trunk Railway, and by them to be forwarded thence to the station nearest Toronto, and at the aforesaid station delivered to" the appellants or their assigns. There was a list of exceptions to liability, and then the clause, "No damage that can be insured against will be paid for, nor will any claim whatever be admitted, unless made before the goods are removed." The ship arrived May 2d or 3d. The tea was unloaded and placed in shipping-sheds. From the shipping-sheds it was removed to the railway freight-sheds on the 6th, 9th, and 12th of May, and delivered at the appellant's warehouse in Toronto on the 13th, 16th, and 17th of May. The shippers were informed by the appellants of damage to the tea on the 30th of May. *Held*, that the clause, "Nor will any claim whatever be admitted unless made before the goods are removed," referred to the removal of the goods from the railway station rather than from the ship, and that not merely patent damage, but latent damage, that an examination at the station would have revealed, was meant. Appeal dismissed.—*Moore* v *Harris*, 1 App. Cas. 318.

BILLS AND NOTES.

1. 16 & 17 Vict. c. 59, § 19, provides, that, if a check is presented to a bank "which shall, when presented for payment, purport to be indorsed by the" payee, the bank shall not be liable by paying the same, &c. Plaintiffs did business in their own name, and also as "S. & Co., Agent, K." In payment for goods bought of the latter concern, defendants gave checks payable to "S. & Co. or order," to K., who indorsed the checks: "S. & Co., per K., Agent," got the money and misappropriated it. *Held*, that the defendants were not liable to the plaintiffs in any form. —*Charles* v. *Blackwell*, 1 C. P. D. 548.

2. The plaintiffs in New York purchased a draft of S. & Co. for £1,000 on S., P., & Co. in London, payable to the order of the plaintiffs. They indorsed it to W. & Co., of Bradford, England, and enclosed it in a letter to W. & Co. for transmission. The letter was placed in the "Letter Box" in the plaintiffs' office, where their letters for the post were usually put. It was stolen by one of their clerks whose duty it was to take the letters to the post-office, and in the course of a fortnight it was presented to defendants' bank, with a forged indorsement by W. & Co., to C. or order, and the blank indorsement of C., the bearer. Defendants received the draft, stamped it with their bank stamp, sent it to S., P., & Co., got the money on it, and turned the money over to the bearer. Evidence was offered at the trial to show that it was the general custom to send a letter of advice with a draft, or on the next steamer when a foreign remittance was made. This evidence was rejected. *Held*, that an action for money received to the plaintiffs' use would lie; that there was no evidence of negligence to estop the plaintiffs from setting up their title to the draft; and that the evidence in question was properly rejected.—*Arnold* v. *Cheque Bank. Same* v. *City Bank*, 1 C. P. D. 573.

3. A check drawn by the plaintiff on M. & Co, his bankers, payable to the order of P., and crossed "L. & C. Bank," was stolen from P., and his indorsement forged. It was then offered to defendant, who, after telegraphing to M. & Co, and receiving word that the check was good, took it in good faith and gave it to his bankers for presentation. Meantime P. learned his loss, wrote to plaintiffs about it, and asked for another check, which was sent him. Afterwards the first check was presented to M. & Co. by the L. and J. Bank, and was paid in spite of the crossing on its face. Subsequently the second check was presented to M. & Co., and paid. The jury found everybody concerned, except the defendant, had been guilty of negligence in the matter. *Held*, that the action could be maintained, as the defendant acquired no title to the check, and M. & Co. paid the first check without authority.—*Bobbett* v. *Pinkett*, 1 Ex. D. 368.

BOND BY SHIPMASTER.—*See* COLLISION, 2.

BROKER.

H. & Co., fruit brokers, gave the plaintiff a sold-note as follows: "We have this day sold to you, on account of James Morand & Co., 2,000 cases oranges," which they signed with their own name merely. In an action against the brokers for non-performance, *held*, that they intended to bind their principals, and that they were not liable as principals themselves.—*Gadd* v. *Houghton*, 1 Ex. D. 357.

See PRINCIPAL AND AGENT, 2.

CARRIER.—*See* COMMON CARRIER.

CHARTERPARTY.—*See* FREIGHT.

CHECK.—*See* BILLS AND NOTES, 1, 2, 3.

CLASS.

1. A testator left an aggregate fund to trustees to pay the income to his wife, and on her death to apply the income to the support

of "such child or children of mine then living, and of the issue of my child or children then deceased, . . . until my youngest surviving child shall have attained the age of twenty-one years." At that time, the trustees were to make certain sales of real estate, and to stand possessed of the whole fund in trust for "my child or children then living, and the issue then living of my child or children dying before that period," the shares of the children to be paid immediately, the shares of the other issue at marriage or the age of twenty-one. The youngest child became twenty-one in 1862. The widow died in 1874, and several of the children had died before her. *Held*, that the class to take was to be ascertained at the widow's death, and the personal representatives of a child dying before that time took nothing.—*In re Deighton's Settled Estates*, 2 Ch. D. 783.

2. A testator gave the residue of his estate to trustees in trust to pay the income to R. M. for his life, and at his death to pay the trust fund to his sister's female children "on their attaining the age of twenty-one years, or marrying with the consent of their parents." R. M. died in 1870, at which time the testator's sister was a widow with two daughters. In 1875, one daughter married with her mother's consent, and she and her husband petitioned for the transfer of a half of the residue of testator's estate. *Held*, that the "consent of parents" must mean, "parents or parent, if any," so that when the daughter married with her mother's consent she took a vested interest, and the class to take was to be fixed when an individual of it became absolutely entitled.—*Dawson* v. *Oliver-Massey*, 2 Ch. D. 753.

CLOAK-ROOM TICKET.—*See* BAILMENT 1, 2.

COLLATERAL COVENANT.—*See* COVENANT.

COLLISION.

1. An Inman steamer, going at ten and a half knots an hour, on a dark night, between Queenstown and Liverpool, overtook and ran down a bark having no light astern. The bark saw the steamer a quarter of an hour before the collision, but had not time enough to run up a light before they struck. The steamer did not see the bark. *Held*, that the steamer was liable, and that there was no contributory negligence on the part of the bark.—*The City of Brooklyn*, 1 P. D. 276.

2. A steamer, bound to a port for a perishable cargo of fruit, negligently ran into a sailing-vessel; and the master of the steamer, to avoid detention, and in good faith, gave a bond binding himself and his owners to pay the damage done. In an action against the vessel by the captain for wages and disbursements, including the amount of the penalty of the bond, *held* that the amount of the penalty must be held in court to abide the result of any claim preferred against the captain in respect of the bond.—*The Limerick*, 1 P. D. 292.

COMMON CARRIER.

The plaintiff shipped two horses on a steamer belonging to defendant, for transportation. There was no bill of lading. In a storm of more than usual violence, partly from the rolling of the ship in the heavy sea, and partly from struggling from fright, one of the horses was so injured that she died. The jury expressly found that there was no want of due care on the part of the defendant, either in taking proper measures beforehand for guarding against storms, or in the treatment of the horse at the time of the storm and afterwards. *Held*, that the defendant was not liable. "Act of God" defined by COCKBURN, C. J.—*Nugent* v. *Smith*, 1 C. P. D. 423; s. c. 1 C. P. D. 19; 10 Am. Law Rev.

CONDITION ON TICKET.—*See* BAILMENT, 1, 2.

CONSIDERATION.—*See* PRINCIPAL AND AGENT.

CONSPIRACY.—*See* FRIVOLOUS SUIT.

CONSTRUCTIVE TOTAL LOSS.—*See* MARINE INSURANCE, 2.

CONTINGENT INTEREST.—*See* MARRIAGE SETTLEMENT.

CONTRACT.

1. The defendants bought rice of the plaintiffs, to be shipped at Madras "during the months of March and or April, 1874, about 600 tons, per *Rajah*, of Cochin." The 600 tons filled 8,200 bags; of which 1,780 bags were shipped Feb. 23, 1,780 bags Feb. 24, 3,560 bags Feb. 28, and the remaining 1,080 bags on Feb. 28, with the exception of 50 bags, which were shipped March 3, on which day the bill of lading for the last 1,080 bags was signed. The defendants refused to accept the rice upon its arrival. Evidence was given that the rice shipped in February would be the spring crop, and equally good with rice shipped in March or April. *Held*, that the defendants were not bound to accept the rice.—*Shand* v. *Bowes*, 1 Q. B. D. 470.

2. The plaintiff contracted with the defendants to construct some dockworks. There was in the contract provision for a penalty of £100 a week in case the works were not completed on or before Aug. 31, 1873. The works were not completed on that date, and on Jan. 22, 1874, the defendants gave notice to the plaintiff to terminate the contract; and they at the same time seized the materials and implements of the plaintiff, under the following clause in the contract: "Should the contractor fail to proceed in the execution of the works in the manner and at the rate of progress required by the engineer, or to maintain the said works to the satisfaction of the engineer, his contract shall, at the option of the company, be considered void, as far as relates to the works remaining to be done; and all sums of money due the contractors, together with all materials and implements in his possession, and all sums named as penalties for non-fulfilment of the contract, shall be forfeited to the company, and the amount shall be considered as ascertained damages for breach of contract." There was a clause providing that if the works were not completed "within the period limited for that purpose," it should be lawful for the company

to assume control of and finish them, in which case the contractor should be paid only for the work he had done. *Held*, that the forfeiture of the sums of money, materials, and implements, as set forth in the above clause, could only be enforced before the expiration of the time limited for the completion of the contract.—*Walker* v. *The London & Northwestern Railway Co.*, 1 C. P. D. 518.

See PRINCIPAL AND AGENT, 1.

CONTRACT TO SELL.—*See* VENDOR'S LIEN.

CONTRIBUTORY NEGLIGENCE.—*See* COLLISION, 1

COVENANT.

Covenant by a lessee to keep only such a number of hares and rabbits as should not injure the crops, &c.; and in case he kept a greater number, he should pay a fair compensation for the damage, to be fixed, in case of disagreement, by two arbitrators. In an action for breach of the covenant to keep only such a number, *held* that the action could be maintained before an arbitration, the clause as to arbitration being a distinct and collateral covenant.—*Dawson et al.* v. *Lord Fitzgerald*, 1 Ex. D. 257.

CREDITOR WITH NOTICE.—*See* JOINT DEBTOR.

DAMAGE TO CARGO.—*See* BILL OF LADING.

DAMAGES, MEASURE OF.—*See* MEASURE OF DAMAGES.

DEAF MUTE.

A deaf mute was found guilty of felony, but the jury also found that the prisoner was not capable of understanding, and did not understand, the proceedings against him. *Held*, that the prisoner could not be convicted; and it was ordered that he be detained as of insane mind during the Queen's pleasure.—*The Queen* v. *Barry*, 1 Q. B. D. 447.

DEBT OF HONOUR.—*See* INFANT.

DELIVERY OF CARGO.—*See* BILL OF LADING.

DISCOVERY.—*See* PRODUCTION OF DOCUMENTS.

DISTRIBUTION.—*See* TRUST TO SELL.

DOCUMENTS, INSPECTION OF.—*See* INSPECTION OF DOCUMENTS.

ESTOPPEL.

A company, formed to build a railway, improperly went on when only one-fifth of the capital stock was taken. In a bill filed by a shareholder to avoid his contract to take shares, it appeared that, for a long time after the company was to his knowledge proceeding illegally, he continued to act with the other members of it, and did not protest against the improper and illegal acts. *Held*, that, though he might have originally had a ground of relief, he had lost it by acquiescence.—*Sharpley* v. *Louth & East Coast Railway Company*, 2 Ch. D. 663.

See BILLS AND NOTES, 2; VENDOR'S LIEN.

EQUITABLE OWNER.—*See* INSURANCE.

EVIDENCE.—*See* BILLS AND NOTES, 2.

FORCIBLE ENTRY.

L. was mortgagee in fee of premises, but did not take actual possession. T. and W. occupied the premises under the mortgagor, who had never been dispossessed. L. one day had a carpenter take off the lock of one of the doors, and he entered into possession. T. and W. entered by a window and expelled L. L. had them indicted for forcible entry. They were acquitted, and sued L. for malicious prosecution without reasonable and probable cause. *Held*, that the action could not be maintained. If L. got the legal possession for civil purposes, that was ground enough for an indictment against T. and W. for forcible entry.—*Lows* v. *Telford et al.*, 1 App. Cas. 414.

FOREIGN JUDGMENT.—*See* MARINE INSURANCE, 2.

FORFEITURE.—*See* CONTRACT, 2.

FORGED INDORSEMENT.—*See* BILLS AND NOTES, 2, 3.

FRAUDS, STATUTE OF.—*See* STATUTE OF FRAUDS.

FREIGHT.

Charterparty by the defendants to convey a cargo of railway iron from England to Taganrog, Sea of Azof, "or so near thereto as the ship could safely get," consigned to a Russian railway company. The ship arrived Dec. 17, at Kertch, a port thirty miles from Taganrog, where the captain, the plaintiff, found the sea blocked up with ice, and unnavigable till April. Against the orders of the charterers, who notified him that they would hold him responsible, he proceeded to unload the cargo; and, there being nobody to receive it, he put it in charge of the custom-house authorities there. The consignees claimed it; and, on their producing the bills of lading and charterparty, it was delivered to them against the captain's claim that it should be retained for freight. A receipt was given to the effect that the cargo was received "on the power of the charterparty and the bill of lading." *Held*, by MELLOR and QUAIN, J.J., that the captain was entitled to no freight; by COCKBURN, C. J., that he ought to have freight *pro rata*.—*Metcalfe* v. *The Britannia Ironworks Co.*, 1 Q. B. D. 613.

FRIVOLOUS SUIT.

The court will stay summarily as frivolous and vexatious an action brought for conspiring to make, and making, false statements about the plaintiff, if the defendants come in and show that they did all that they did as members of a military court of inquiry, and in the performance of their official duty.—*Dawkins* v. *Prince Edward of Saxe Weimar*. *Same* v. *Wynyard*. *Same* v. *Stephenson*, 1 Q. B. D. 499.

FUND IN COURT.—*See* MARRIAGE SETTLEMENT.

GOOD-WILL.—*See* MORTGAGOR AND MORTGAGEE.

INDORSEMENT OF CHECK.—*See* BILLS AND NOTES, 1, 2, 3.

Digest of the English Law Reports.

INFANT.

B., being of full age, promised to pay, "as a debt of honour," a debt contracted when under age. Such a promise is not a "ratification of the contract made during infancy," as a "debt of honour" cannot be enforced at law.—*Maccord* v. *Osborne*, 1 C. P. D. 569.

INSPECTION OF DOCUMENTS.

Letters written and sent for the confidential and private information of the solicitor of a party in a future suit, and having reference to the subject-matter thereof, are not privileged. But if they are written in reply to the application of such solicitor, with a view to using the information so obtained in the suit, the case is otherwise.—*M'Corquodale* v. *Bell*, 1 C. P. D. 471.

INSUFFICIENT ASSETS.—*See* RESIDUARY LEGATEE.

INSURANCE.

D. became owner of a vessel in December, 1868, and the plaintiff equitable mortgagee. D. applied for insurance on the vessel in the defendant company in January, 1869, ordering the policy made in plaintiff's name, and sent to him. The policy, in the usual form, was made in the name of D., but sent to plaintiff. D. did not inform the defendant company that plaintiff was equitable mortgagee. In the policy, *inter alia*, was this: "This is to certify that Mr. D., as ship's-husband for the H., whereof is master at the present time D, has this day paid £17 10*s.* for insurance . . . on said vessel." In January, 1870, while the vessel was on a voyage, plaintiff took out a policy like the preceding, but in his own name as ship's-husband. In March, 1870, plaintiff, on application of the defendant company, paid the yearly assessment for losses, and received a receipt therefor as husband of the said vessel. In October, 1870, he paid another. In May, 1870, D. transferred the vessel to the plaintiff, who became registered owner. The defendant company had no notice of this. Later, D. put in a claim for the loss of an anchor. In November, 1870, the vessel was lost, and in December plaintiff put in a claim for the insurance. In January, on request of the company, D. attended a meeting of the directors to consider the claim. After his withdrawal they resolved that there was no claim. In April, 1871, another meeting was held, which came to a similar resolution; but D. was not notified, and the plaintiff had no notice of either meeting. Neither D. nor the plaintiff had signed, or been asked to sign, the articles. The company was a limited mutual insurance company. Every person insuring a ship in the company was a member, provided he signed the articles. The directors were to manage the affairs of, and act fully for, the company, with full power to settle disputes between members and the company; and no member could bring suit against the company, except as thus provided. If any member sold his ship, the new owner was to have no claim upon the company for loss. In case of loss, the directors were to summon the owner, master, or crew, as they saw fit, and make enquiry as to the loss. *Held*, reversing decision of the Queen's Bench, that the plaintiff could recover. (ARCHIBALD, J., and POLLOCK, B., dissenting.)—*Edwards* v. *The Aberayron Mutual Ship Insurance Society*, 1 Q. B. D. 563.

JOINT DEBTOR.

The defendants, R. and H., who were partners, had been in the habit of consigning goods through the plaintiffs to B. and S. for sale, the proceeds to be remitted by B. and S. to the plaintiffs. By an agreement in writing between plaintiffs and R. and H., these remittances were to be held to pay any advances made by plaintiffs on account of R. and H.; and the balance was to be sent to R. and H. The practice was for the defendants to draw on the plaintiffs, who accepted the drafts; and the defendants discounted their acceptances. In case the goods were not sold in season for the acceptances to be met, the defendants made a new draft, which the plaintiffs accepted. Thus the plaintiffs got new funds to meet the old acceptances, and the defendants got further time. This course continued for five years, at the end of which time R. and H. dissolved partnership. At that time there were goods in the hands of B. and S. for sale, and the plaintiffs had, on the security of them, accepted R. and H.'s drafts. H. went on with the business, and drew new drafts in the same manner, in the name of "R. and H., in liquidation." A year after the dissolution, H. informed plaintiffs that R. had withdrawn, and that he (H.) would go on with the business. Plaintiffs afterwards accepted R.'s drafts in the manner above described, by the discount of which they were saved cash advances. The action was brought partly for advances which had been renewed by "R. and H., in liquidation," partly for advances which had been renewed by H.'s draft alone, accepted by plaintiffs. *Held*, that the plaintiffs had a right to treat both H. and R. as principal debtors, and that R. was not discharged by the extension of time given H. in pursuance of the practice of the parties—*Swire et al.* v. *Redman & Holt*, 1 Q. B. D. 536.

LACHES.—*See* ESTOPPEL.

LEASE.

The *habendum* of a lease stated the term as 94¼ years, the *reddendum*, as 91¼. The counterpart of the lease signed by the lessee had 91¼ in both parts. *Held* that the *habendum* must control the *reddendum* in the lease itself, and that the counterpart must be made to follow the lease, and that the term was therefore 94¼ years—*Burchell* v. *Clark*, 1 C. P. D. 602.

LIABILITY OF MASTER. *See* COLLISION, 2.

LIABILITY OF SHIP-OWNER.—*See* BILL OF LADING.

LIEN.—*See* VENDOR'S LIEN.

Life Insurance.—*See* Amalgamation of Companies.

Limitations, Statute of.—*See* Statute of Limitations.

Malicious Prosecution.

The declaration set forth that the defendants falsely and maliciously wrote and published a certain notice, requiring the plaintiff, under the Insolvent Act of Canada, to make an assignment of his property for the benefit of his creditors, as certain promissory notes on which the plaintiff was liable to the defendants and others had long been overdue, and were unpaid. In another count, it was complained that the defendants maliciously, and without probable cause, had the plaintiff arrested, in a suit on certain promissory notes indorsed to the defendants by the plaintiff, on the ground that he was about to leave the country; when the court subsequently found that he was not about to leave the country, and ordered his discharge. The defendants replied to the first count, that the notice in question was true, and was not published, except to the plaintiff. To the last count they replied simply, that the note was long due, and that they had been informed, and believed, the plaintiff intended to leave. The court ruled, that, unless the defendants believed that they would lose their debt unless they had the defendant arrested, or if they acted with the idea of protecting other indorsers who might otherwise be liable to them, there would be evidence of want of reasonable cause for the arrest sufficient to justify damages. *Held*, error in the charge, and that the said notice was a legal proceeding, and *prima facie* privileged.—*Bank of British North America* v. *Strong*, 1 App. Cas. 307.

See Forcible Entry.

Marine Insurance.

1. The brig *Jessie*, from Falmouth, arrived at Mazagan, in Morocco, Dec. 27, 1874. Jan. 1, 1875, she was driven from her moorings in a gale, and lost her anchor. On the 9th, the captain wrote the plaintiff, who was owner, but said nothing about the loss of the anchor. The letter reached the plaintiff on the 24th, and, just a month later, the plaintiff, having had no further news of the vessel, had her insured in the defendant company, "lost or not lost." He said to the company's agent, "I do not know when she was ready to sail; I have not had the sailing letter yet." The usual time for loading at Mazagan was fifteen to twenty days, and for the voyage home, twenty-five to thirty, and the course of the post was irregular. After verdict for plaintiff, a motion to enter verdict for defendants, on the ground that the failure by the captain to mention the loss of the anchor constituted a material concealment, was refused. *Quære*, if a failure to communicate such a fact forms a defence, unless fraudulent.—*Stribley* v. *Imperial Marine Ins. Co.*, 1 Q. B. D. 507.

Marriage Settlement.

Where a husband, by a post-nuptial settlement, made a covenant to settle on his wife any property to which she was, or during the marriage should become, entitled, it was *held* that a fund in court, then contingent, and which came into possession after her death, was included.—*Agar* v. *George*, 2 Ch. D. 706.

Marshalling Assets.

Testator made several pecuniary legacies, and devised a specific real estate to one son, and the residuary real estate to another. There was not enough personalty to pay the debts beside the legacies. *Held*, that the pecuniary legacies must be exhausted in making up the deficiency before resorting to the real estate.—*Farquharson* v. *Floyer*, 3 Ch. D. 109.

Master and Servant.

1. The defendants employed the plaintiff with other workmen, and also a steam-engine, with an engineer, in sinking a shaft in their colliery. When the work was partly done they employed W., under a verbal contract, to finish it. W. was to employ and pay the plaintiff and the other workmen. The engine and engineer were under his control, but the engineer's wages were to be paid by the defendants. The plaintiff was injured through the negligence of the engineer. *Held*, that the defendants were not liable.—*Rourke* v. *The White Moss Colliery Co.*, 1 C. P. D. 556.

2. The S. Club, composed of persons interested in agriculture, made an agreement with the defendant company for the use of the company's hall for their annual shows. By this agreement the hall was, during the times of the shows, at the entire disposal of the club. The company was to provide accommodation for the stock and things exhibited, and provide and pay a sufficient body of men to do all the work about the show, and who should be under the exclusive control of the club. The company was to pay £1,000 to the club at each show, and be at liberty to charge and receive an admission fee of 1*s*. The club was to have entire and exclusive control of the show while it was in progress. The club contracted with one S. to see to admitting the stock, &c., at the gate, to its disposition, and to its delivery. He admitted and delivered on orders signed by the club, and was paid in the lump for the whole job. Plaintiff bought some sheep of an exhibitor at the show, and got an order to S. for their delivery. S. delivered him other sheep in place of his own. *Held*, that the defendant company was not liable.—*Goslin* v. *The Agricultural Hall Co.*, 1 C. P. D. 483.

3. Contract in writing, as follows: "I hereby accept the command of the ship C. C., on the following terms: Salary to be at and after the rate of £180 per annum." "Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command; and the owners have the option of paying or not paying his expenses travelling home." "Wages to begin when captain joins ship." The captain was dismissed, not for misconduct, but without notice. *Held*, that the captain was

entitled to reasonable notice under this contract.—*Green* v. *Wright*, 1 C. P. D. 591.

Measure of Damages.

The plaintiff, who was contractor for the construction of a tramway with a tramway company, contracted with defendants that they should lay with asphalt and maintain in good order for twelve months the said tramway. Within the twelve months, one H., driving over the road, was thrown out and hurt, in consequence of the defective condition of the asphalt. H. sued the tramway company, who gave notice to the plaintiff. Plaintiff gave notice to the defendants. They refused to settle; and plaintiff, by negotiation, finally settled by paying £110: £70 damages, and £40 H.'s costs. He sued for these sums, together with £18 costs of his own in getting the claim reduced. *Held*, that the defendants were only liable for the £70 damages.—*Fisher* v. *The Val de Travers Asphalte Co.*, 1 C. P. D. 511.

Mistake.

G. P. R., an undischarged bankrupt, ordered goods from a firm under his old firm name of "J. R. & Co., Mincing Lane, Plymouth." The firm sent them, thinking the order was from "R. Bros. & Co., Old Town St., Plymouth," with whom they had had dealings. G. P. R.'s trustee in bankruptcy seized and claimed the goods, and the sellers, learning the mistake, sued to recover them. *Held*, that no property in them had passed, and the trustee must restore them.—*In re Reed. Ex parte Barnett*, 3 Ch. D. 123.

Mortgagor and Mortgagee.

P., lessee of certain dock premises, and the machinery movable and immovable thereon, for twenty-one years, mortgaged the same to L. & Co. Afterwards a railway company gave notice to P. to buy the premises for the railway under the Lands Clauses Act. P. died; and L. & Co. took possession, and gave notice to the railway company that they wished the compensation settled by arbitration. The company, and the executors and mortgagees, concurred in the appointment of an umpire; and he made an award of a certain sum including £2,800 "in respect of trade profits which would have accrued if the premises had not been taken" by the railway company. The executors claimed this sum. *Held*, that it belonged to the mortgagees. *Pile* v. *Pile. Ex parte Lambton*, 3 Ch. D. 36.

Mutual Insurance.—*See* Insurance.

Negligence.—*See* Bills and Notes, 2, 3.

Negligence of Fellow-Servant.—*See* Master and Servant, 1.

Notice.—*See* Master and Servant, 3.

Partnership.—*See* Joint Debtor.

Patent.

Three referees were appointed under an act of Parliament to inquire into the impurities of the London gas, with right to require the gas companies to afford them facilities for their investigations. As a result of their examinations, one of the number thought he had discovered a method of securing greater purity in the gas. The impurities complained of came from certain compounds of sulphur. The defendant company had experimented on the matter, and had been using lime in the purifiers. This, with the contents of the purifiers, formed sulphide of calcium, with which the sulphur impurities combined. The carbonic acid of the gas impeded the action of the sulphide of calcium, and the result was, the gas came out too impure for use, and could not always be relied upon to come out with the same degree of purity. The gist of the plaintiff's change consisted in keeping more lime in the first set of purifiers. In this way the carbonic acid was more effectually removed, and the subsequent processes of removing the sulphur impurities by sulphide of lime were much more effective. The change was suggested to the defendant company by the referees, and the latter tried it, with success. The referees made their report, incorporating these suggestions and experiments; but the report was withheld from publication, to enable the plaintiff to get out a patent. *Held*, that the plaintiff's idea only amounted to a more thorough application of something in use before. *Quære*, whether a public official can patent the result of an official investigation.—*Patterson* v. *Gaslight & Coke Co.*, 2 Ch. D. 812.

Petition of Right.

English merchants authorized by the law of China to trade only with members of a Guild called the Cohong. War broke out between England and China, the Cohong was abolished, and the English merchants lost their only remedy, which was against the Cohong. A treaty was made between the countries, under which China paid to the British Government a certain sum on account of debts due from former members of the Cohong to said merchants. It was *held* that a petition of right would not lie by one of said British merchants to obtain payment of a sum of money alleged to be due from a former member of the Cohong.—*Rustomjee* v. *The Queen*, 1 Q. B. D. 487.

Power to Sell.—*See* Trust to Sell.

Principal and Agent.

1. Action for breach of the following undertaking: "I undertake to load the ship *Der Versuch*, twenty-nine keels, with Bebside coals, in ten colliery working days. On account of Bebside Colliery, W. S. Hoggett." Hoggett, the defendant, was a clerk of the colliery company, which had made a contract with B., W., & Co., to furniah them a certain amount of coal in the months of January, February, and March, "the turn to be mutually agreed upon." B., W., & Co. chartered the plaintiff's ship to convey the coal; and the plaintiff, objecting to the provision of the charterparty as to the matter of detention in loading "in turn," the above undertaking was procured, and the charter was completed. The undertaking purported to be with nobody in particular. The vessel was detained be-

yond ten days, and the claim was for demurrage. *Held*, that the jury properly found that the defendant was personally bound, though he did not know he was making the undertaking in reference to a pending charter, and that there was consideration therefor.—*Weidner* v. *Hoggett*, 1 C. P. D. 533.

2. A broker is not personally liable on a note signed by him, and running thus: "I have this day sold by your order and for your account, to my principals, five tons anthracene." *Southwell* v. *Bowditch*, 1 C. P. D. 374; s. c. 1 C. P. D. 100; 10 Am. Law Rev

See Bills and Notes, 1; Broker.

Privileged Communication.—*See* Inspection of Documents; Production of Documents.

Privity.—*See* Master and Servant, 2.

Production of Documents.

A banking company, having a controversy about an alleged fraudulent transfer of an account, at one of its branch offices, telegraphed to the manager of the branch office to write full particulars. In the suit that followed, the bank refused to produce the letter sent in answer to the telegram, claiming it to be privileged. *Held*, that it must be produced. *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644.

Proximate Result.—*See* Measure of Damages.

Public Official.—*See* Patent.

Ratification of Contract.—*See* Infant.

Realty and Personalty.—*See* Marshalling Assets.

Residuary Legatee.

A testatrix gave life annuities, and ordered funds invested to pay them. She then gave the residue of her estate, "including the fund set apart to answer the said annuities, . . . when and so soon as such annuities shall respectively cease," to J. The estate paid only 5*s.* in the pound, and the court ordered sums apportioned to each annuity to be invested and the income duly paid. One of the annuitants died, and J. claimed the fund out of which this annuitant had received his annuity. *Held*, that all the annuities must be paid in full before J. could take any thing as residuary legatee. *In re Tootal's Estate. Hankin* v. *Kilburn*, 2 Ch. D. 628.

Right, Petition of.—*See* Petition of Right.

Sale.—*See* Vendor's Lien.

Salvage.

The steamer M., from Sumatra to Jedda, with 550 pilgrims, was wrecked on the Parkin Rock, in the Red Sea, two or three days' voyage from Jedda. The steamer T. came up, and her captain refused to rescue and carry to Jedda the pilgrims for less than £4,000, the whole amount of the passage-money from Sumatra to Jedda. The captain of the M. at last agreed to give this amount. *Held*, that the bargain was inequitable, and must be set aside. £1,800 was awarded.—*The Medina*, 1 P. D. 272.

Sheriff.

A sheriff seized goods under a *fi. fa.*, and the execution creditor afterwards lost his claim under the execution by accepting a composition from the execution debtor. He gave no instructions to the sheriff how to proceed, and the sheriff sold the goods for his fees and expenses. *Held*, that the execution debtor could maintain trover or trespass against the sheriff in respect of the goods so sold.—*Smearg* v. *Abdy*, 1 Ex. D. 299.

Slander.

In an action to impeach a testator's signature to a will to which the plaintiff was an attesting witness, the defendant testified as an expert that he thought the signature was forged. The jury found in favor of the will, and the presiding judge animadverted severely upon the hardihood of the expert. These strictures were published next day in the *Times*. Afterwards defendant was called in an action for forgery, and testified that the alleged forgeries were genuine signatures. The counsel in cross-examination, referred to the witness' testimony in the previous case, the remarks of the judge, and the item in the *Times*, and sat down. Thereupon the witness began an "explanation" of the previous case, and, in spite of the efforts of the judge to stop him, said: "I believe that will to be a rank forgery, and I shall believe so to the day of my death." The jury found, on special questions put them by the judge, that the witness spoke these words not in good faith as a witness, nor in answer to any question, but for his own purposes, and maliciously. *Held*, that the words were privileged. —*Seaman* v. *Netherclift*, 1 C. P. D 540.

Sold Note.—*See* Broker.

Statute.

A man may be convicted and fined for "riding a horse furiously so as to endanger the lives of passengers, under the following statute: "If any person, *riding* any horse or beast, or *driving* any sort of carriage, shall *ride* or *drive* the same furiously so as to endanger the life of any passenger, every person so offending and being convicted of such offence shall forfeit a sum not exceeding £10 in case such *driver* shall not be the owner of such waggon, cart or other carriage, [and in case the offender be the owner of such waggon, cart, or other carriage,] then any sum not exceeding £10."—*Williams* v. *Evans*, 1 Ex. D. 277.

Statute of Frauds.

The following note by W.'s solicitor to A.'s solicitor is not such as to meet the requirements of the Statute of Frauds, although a verbal agreement was made, as there stated: "W. has been with us to-day, and stated that he had arranged with your client A. for the sale to the latter of the Lion Inn for £950. We therefore send herewith draft contract for

perusal and approval.—*Smith* v. *Webster*, 3 Ch. D. 49.

Statute of Limitations.

A writ was issued in the Common Pleas for a claim not then barred, but it was never served. After the claim was barred, but within six months of the date of the writ, the time allowed by the Procedure Act for the writ to remain in force, a bill in Chancery was brought for the same claim. *Held*, that the writ would have saved the claim in the Common Pleas, but was of no effect against the statute in proceedings in equity. *Manby* v. *Manby*, 3 Ch. D. 101.

Sub-contractor.—*See* Master and Servant, 2.

Tenant in Tail.

G. R. had an estate tail expectant on the death without issue of C. R., a lunatic. C. R. died without issue, and G. R. had converted his estate tail into a base fee, and died leaving a widow and children. The land was sold and the fund paid into court. G. R.'s widow and children petitioned to have the fund paid out to them. *Held*, that they must first produce a proper deed enlarging the base fee. *In re Reynolds*, 3 Ch. D. 61.

Ticket.—*See* Bailment, 1, 2.

Time for Completion of Contract.—*See* Contract, 2.

Transfer of Shares.—*See* Contributory 1, 2.

Trust to Sell.

A testator left his property, including a newspaper, to his son W., and two others, trustees in trust, among other things, "to carry on, or cause to be carried on, under their inspection and control, during the life of my said wife," the newspaper. He directed a reserve fund of one-fourth part of the profits of the newspaper to be set apart each year to aid in carrying it on, and then directed the trustees to divide the remaining three-fourths of the profits of the paper, and his other property, into six parts, and to pay one part to each of his five children named, and one to his wife; and in case a child died without issue before the death of the wife, his share to go to the surviving children. Then followed: "In case any of my children shall survive my wife, and die before he shall have received his share of my trust estate without leaving issue, I give such share equally amongst my surviving children." Then came this: "And from and after the decease of my wife (or during her life if she and the majority of my children and my trustees shall think it proper and expedient so to do), at the sole discretion of my trustees, or trustee, to sell and absolutely dispose of all my real and personal estates, and my trade or profession [the newspaper], and the good-will thereof, and to divide the proceeds thereof amongst my wife and children and their issue, if the division be made in the lifetime of my wife, but if the division be made after her death, amongst my children and their issue." Then followed a provision, that, in case it was decided to sell the paper under the foregoing provisions, the eldest son should have the privilege of taking it at £500 under the market value. *Held*, that the will created an absolute trust to sell at the death of the wife, and a trust to sell in the discretion of the trustees as to the time and manner thereof, during her life; and that at the wife's death the surviving children took equal vested shares in the newspaper and the residue of the property.—*Minors* v. *Battison*, 1 App. Cas. 428.

Ultra Vires.—*See* Debentures.

Vendor's Lien.

Dec. 31, 1873, the defendants sold to B. & Co. one hundred tons zinc, out of a gross lot lying on the wharf, and at the same time made two "undertakings," as follows: "We hereby undertake to deliver to your order indorsed hereon twenty-five tons zinc off your contract of this date." Jan. 7, 1874, the plaintiffs bought of B. & Co. fifty tons zinc, and paid for it. Jan. 14, B. & Co. failed, having given the defendants a bill for the zinc, which was dishonored; and the defendants refused to deliver the zinc to the plaintiffs. *Held*, that the assumed undertaking to deliver did not estop the defendants from setting up against the plaintiffs their right as unpaid vendors to stop the goods.—*Farmeloe* v. *Bain*, 1 C. P. D. 445.

Vested Interest.—*See* Class, 1; Trust to Sell.

Wages and Disbursements.—*See* Collision, 2.

Waiver.

In bankruptcy proceedings against the holder of a lease, the lessors sent the trustee in bankruptcy a notice to disclaim the lease within twenty-eight days, as the Bankruptcy Act provided. Some letters followed; and the day before the twenty-eight days were up the lessors wrote, "We should be glad to have a reply to our letter of the 24th ult., as to whether you intend to retain the lease, at your earliest convenience." The letter of the 24th ult. contained the notice to disclaim. *Held*, that the right to a disclaimer within the twenty-eight days was waived by the lessors.—*Ex parte Moore. In re Stokoe*, 2 Ch. D. 802.

Warehouseman.—*See* Bailment, 1, 2.

Will.—*See* Class, 1, 2; Residuary Legatee; Trust to Sell.

Witness.—*See* Slander.

Words.

"*Act of God.*"—*See* Common Carrier.

"*For your Account.*"—*See* Principal and Agent, 2.

"*On Account of.*"—*See* Broker.

"*Receive*," "*Divide.*"—*See* Trust to Sell.

"*Rider*," "*Driver.*"—*See* Statute.

CORRESPONDENCE.

County Judges as Benchers.

To the Editor of the Law Journal:

Sir,—In your April number an ex-Bencher says, "According to the ancient usage and custom of the Benchers of the different Inns of Court in England, a County Judge has been always held ineligible and disqualified for holding a seat in Convocation," etc.

A reference to the English Law List for 1875, (the latest in Osgoode Hall Library), shows, among the Benchers of Lincoln's Inn, two County Judges; among those of the Inner Temple, four; and among those of Gray's Inn, one.

Q. C.

REVIEWS.

Blackwood's Edinburgh Magazine for April, 1877, republished by the Leonard Scott Publishing Co., 41 Barclay Street, New York.

The following are the contents:

The French Army in 1877.

A Woman-Hater.—Part XI.

Crete.

Pauline.—Part III.: In the Hebrides.

Harriet Martineau.

A Railway Journey.

Translations from Heine, by Theodore Martin.

The Political Situation.

Some papers on the state of the French army having been published in *Blackwood's Magazine* during the year 1875, their author thinks it would be an advantage to France to note the change in her military position since that time. He admits that "France cannot attack Germany," but "if invaded she can now, most certainly defend herself."

The description of Crete, if rather long, is interesting. One object of the article is apparently to show the British lion a place that is just the right size and shape to make a rest for one of his paws.

The review and criticism of the Autobiography of Harriet Martineau is very unfavorable. The writer thinks she has been much overrated, finds it "difficult to understand on what her great reputation was founded;" and adds, "it will not be increased by her Autobiography, where that good sense which is her strongest point shows less than ever before." Blackwood has never been a friend of this author and what is said must be taken *cum grano salis*.

The light and airy articles are up to the mark, and the whole concludes with the usual discussion of the Eastern Question.

The periodicals reprinted by this company are as follows: *The London Quarterly, Edinburgh, Westminster*, and *British Quarterly Reviews*, and *Blackwood's Magazine*. Further particulars are given in the advertising columns.

A Treatise on the Law of Insurance. By S. R. Clarke of Osgoode Hall, Barrister-at-Law, Toronto. R. Carswell, 1877.

This is a re-publication of a work no insurance, published a few years ago. The present volume contains a supplement which gives a full note of all the decisions in the Dominion reported to March, 1877. We have already alluded to this book, and therefore need only call attention to the additional of the supplement.

The Law of the Road; or, Wrongs and Rights of a Traveler. By R. Vashion Rogers, Jr., Barister, etc. San Francisco, Sumner Whitney & Co.; New York, Hurd & Houghton; Cambridge, The Riverside Press.

This is a new edition of a work, the first edition of which we noticed at some length. Most of the matter contained in it, originally appeared in a series of articles in these pages. We are glad to have been at the birth of such a creditable and successful production. We cannot de-

scribe it better than by giving an extract taken haphazard from its pages. The hero and his friend have just left the house to start for an afternoon walk.

"Scarce had our feet touched the sidewalk when, with the exclamation, 'Get out you rascallion!' Jones executed a *pas seul*, and then lay sprawling on the ground; and the small boy —whose sled as it slid swiftly down the board walk my friend had vainly endeavored to avoid —glided merrily on. As I whisked the snow off, Jones in wrathful accents consigned the juvenile to a place beyond the possible limits of frost, and exclaimed:

"'I'll sue the city for allowing the road to be in such a beastly state. Corporations are bound to keep the street in a proper condition, so that the lives and bones of passers-by will not be endangered.'

"'True,' I replied, 'but the accident was not wholly caused by the slipperiness of the pavement; the unlawful and careless act of the boy in coasting had something to do with your overthrow; and in the exactly similar case of Mrs. Shepherd it was decided that the city was not liable.' *

"'I tell you all towns and cities must keep their highways and streets in repair, so that they are without obstructions or structural defects which may endanger the safety of travellers, and are sufficiently level and smooth, and guarded by railings when necessary, to enable people, by the exercise of ordinary care, to move about with safety and convenience.' †

"'You repeated that sentence very well and with great emphasis. It is quite correct in a general way that highways, streets and sidewalks should at all times be safe and convenient, but then regard must be had to the locality and intended uses ‡ Towns are liable only for injuries caused by defects and obstructions for which they might be indicted. ‖ They do not insure the safety of all using sidewalks in the depths of our northern winters;§ and it has been expressly decided that the mere existence of a little ice on the walk is no evidence of actionable negligence:¶ the slipperiness of the ice, if the walk is properly constructed and free from accumulations of snow, will not give those who fall a right to sue a city with success.** One must go gingerly and with due care on such occasions.'††

"'All very fine,' said Jones, 'but when my friend Clapp, in walking along the streets of the city of Providence, at night, fell on some ice and broke his thigh, he recovered damages.'

"'Yes, I remember; but then there was a ridge of ice and snow, hard trodden, in the centre of the sidewalk, which was considered such an obstacle as the city should have removed.' And'—

"Ere I had completed my sentence the hour of my doom had struck, and I was as white as ever miller was; an avalanche of snow slid off a roof and thundered down on my devoted head. Jones with a smirk asked me if I was going to sue for damages. Sadly, as I twisted my head slowly round and nodded first to right and then to left, to see if the vetebræ were all in working order, I replied:—

"'Ah, no! I cannot do so with success.† It's a case of *damnum absque injuria*."

"'Ho! ho!' laughed my companion; 'strong language; but no wonder.'

"'If the owner of the house had left the ice and snow there for an unusual and unreasonable time after he knew of its presence and might have removed it, he probably would have been liable to me,‡ or, if that old awning had fallen on me,‖ or if that lamp hanging over Sol's Arms' door had lighted on my crown, producing an extra bump, for the edification of Fowler and Wells and the savants of that ilk, I might have got something in the first case out of the city; in the other from the landlord.§ Or if one of those barrels had rolled out of that warehouse, and, thumping against your legs, had brought you down, you might have sued the merchant.¶

"'Look at that poor old woman; she will come to grief most assuredly.'

"Before us toddled an aged granny, assisting her septuagenarian extremities with an antique looking umbrella, of no color known to this life. It was of a 'flabby habit of waist, and seemed to be in need of stays, looking as if it had served the old dame for long years as a cupboard at home, as a carpet-bag abroad.'

"'So feeble a person should not be out in such slippery weather unattended;** people should exercise common prudence. One who has poor sight should take greater care in walking the streets than one in full enjoyment of her faculties.'††

"'I fancy the least obstacle or hole would upset her,' said Tom.

"'And if she did stumble over a small impediment she could not sue the city for damages. So the court held where a man fell over the hinge of a trap-door projecting a couple of inches above the sidewalk in a village.‡‡ But the degree of repair in which the walks must be kept depends considerably upon the locality; one may reasonably expect better pavements in a city than in a village; and so in Boston where an iron box four inches square, set in a sidewalk by a gas company, had a rim projected an inch above the level, the city was held responsible for injuries caused by it.'‖‖

* *Shepherd et ux* v. *Chelsea*, 4 Allen 13; *Hutchinson* v. *Concord*, 41 Vt. 271; *Ray* v. *Manchester*, 46 N. H. 59.

† *Hixon* v. *Lowell*, 13 Gray 49; *Barber* v. *Roxbury*, 11 Allen 320; *Hewison* v. *New Haven*, 34 Conn. 142.

‡ *City of Providence* v. *Clapp*, 17 How. 168.

‖ *Merrill* v. *Hampden*, 26 Me. 234.

§ *Ringland* v. *Toronto*, 23 C. P. Ont. 93.

¶ Ibid.

** *Stanton* v. *Springfield*, 12 Allen 566; *Hutchins* v. *Boston*, Ib. 571 n.

†† *Wilson* v. *Charlestown*, 8 Allen 137.

* *City of Providence* v. *Clapp*, 17 How. 168; *Church* v. *Cherryfield*, 33 Me. 460.

† *Hixon* v. *Lowell*, 13 Gray 59.

‡ *Shipley* v. *Fifty Associates*, 101 Mass 251; *S. C.* 106 Mass. 194.

‖ *Drake* v. *Lowell*, 13 Met. 292.

§ *Terry* v. *Ashton*, L. R., 1 Q. B. D. 314.

¶ *Byrne* v. *Boadle*, 2 H. & C. 722; *Randleson* v. *Murray*, 8 Ad. & E. 109.

** *Davenport* v. *Ruckman*, 37 N. Y. 568.

†† *Winn* v. *Lowell*, 1 Allen 180.

‡‡ *Ray* v. *Patrolia*, 24 C. P. Ont. 73.

‖‖ *Loan* v. *Boston*, 106 Mass. 450; *Bacon* v. *Boston*, 3 Cush. 174.

"'If she did meet with an accident and was held entitled to damages, what would she get in hard cash?' asked Jones.

"'Tis impossible to say. It would depend upon so many things. In one case where an old man of seventy, who was very feeble, fell at night into an opening for a drain in the sidewalk, which was covered with boards laid at right angles with the others and projecting some two inches, over which he stumbled, the jury gave $4,000 damages; but the court held that excessive, as the old man was insolvent and incapable of much labor.'*

"'That was a large sum for injuries.'

"'But the old fellow died. We go in here,' I added.

"'You may, I will not,' replied Jones, as he leant against the railing of a bridge over a little stream.

"'Well do not stand there; if the board gives way and lets you down, you will have no remedy against the city; for it is not bound to keep up railings strong enough for idlers to lounge against, or children to play upon.† Look out, there is another sled!' As I rang the door bell I heard Jones mutter: —

"'Those boys ought to be indicted for obstructing the sidewalk in such a way.'

"'True for you,' I mentally ejaculated, 'I remember that one of those bewitched and besaddled wheelbarrow concerns, yclept velocipedes, was held to be an indictible obstruction.'‡

Judge Redfield, no mean authority, says of Mr. Rogers' book: "The book is as interesting as a novel, and more instructive in the law than most books addressed particularly to that object." Speaking of it in general terms, both as to the subject, its treatment and appearance, it may not be inappropriate to describe it in a Pickwickian manner as the "neatest, gwacefullest, pwettiest thing that ever wan upon wheels."

* *Hutton* v. *Windsor*, 34 Q. B. Ont. 487.

† *Stickney* v. *Salem*, 3 Allen 374; *Gregory* v. *Adams*, 14 Gray 242.

‡ *Reg* v. *Plummer*, 30 Q. B. Ont. 41.

FLOTSAM AND JETSAM.

A physician reproaching a lawyer with what Mr. Bentham would, perhaps, have called the "uncognoscibility" of legal nomenclature, said: "Now, for example, I never could comprehend what you lawyers mean by *docking an entail.*" "My dear doctor," replied the lawyer, "I don't wonder at it; but I will explain; it is what your profession never consent to—*suffering a recovery.*"

THROWING AN EGG AT A JUDGE.

[From *Punch*.]

ON FINDING THE FRAGMENTS OF AN EGG UPON THE CHAIR OF VICE-CHANCELLOR MALINS.

Hens sit, and judges sit—'tis fair to match 'em,
Since one has lately given much pains to Hatch-
am,
And laid a yoke (some say) on our theology;
But this egg surely had its nest mistaken.
Eggs in the Rolls would scarcely need apology,
And every one has heard of Eggs and Bacon.
How then account for this misplaced ovation?
Why thus:—Our memory may have its failings,
But we account for it by this quotation,
"Ab ovo usque ad (Flacco pace) Mal-ins."

The London *Times*, in speaking of the attack on the Vice-Chancellor with an egg, says: Such a scene is happily of very rare occurrence. The old law reports, however, give a few cases of the kind, which seem to have been punished with extreme severity. In "Dyer's Reports" (reprinted 1688, for assaulting a witness in court a man was condemned to imprisonment for life, to forfeit his goods, and to have his right hand amputated at the "Standard in Cheape." A case more directly in point is reported in the quaint Norman French of the law courts as follows: "Richardson ch. Just. de C. Banc al Assizes at Salisbury in summer 1631 fuit assault per prisoner la condemne pur felony que puis son condemnation ject un brickbat a le dit Justice que narrowly mist, and pur ce immediately fuit indictment drawn per Noy envers le prisoner and son dexter manus ampute and fix al gibbet sur que luy mesme immediatement hange in presence de Court." The Noy herein mentioned was the Attorney-General. Another case reported in the same book (page 188 b, marginal note) records the fact that for striking Sir Thomas Reynolds with a stick Sir William Waller was fined £1,000 and ordered to be imprisoned during the Royal pleasure.

Circumstantial Evidence.—Mr. Jules de Gastyne, in the Parisian journal *Le Nain Jaune*, gives a very remarkable story of circumstantial evidence in a Spanish criminal case, the names of the actors in which are unfortunately suppressed. According to the chronicler, a quarrel arose between two gentlemen at a Madrid theatre, apropos of a pinch of snuff offered by one to the other, and causing the latter to sneeze in

the donor's face. Words passed, ending in a challenge. One of them left and went to buy a pair of pistols, and then hurried to say farewell to a lady friend before making his way to the selected battle ground. While doing so a sneak thief penetrated to the room and was about to make away with the gentleman's overcoat, which hung against the wall. At that precise moment the woman opened the door, perceived the robber and gave the alarm, whereupon the robber, with one of the pistols in question, fired upon her, and she fell fatally wounded. The firearm, recently discharged and still smoking, was found opposite her. No one had seen the thief enter or go out, though the shot had been heard. The gunsmith who had sold the pistols fully identified them, and said that the purchaser had asked him to load them carefully on buying them, and it was only after the greatest difficulty that the unfortunate victim of circumstantial evidence was enabled, if not exactly to prove his innocence, at least to cause sufficient doubt in the minds of the jury to justify a verdict of what the Scotch would call "not proven."

Working on their Feelings.—An old fellow, who gave his name as Charles H. Slosson, was called up in Judge Wright's court on the charge of drunkenness. He was a remarkably seedy-looking specimen, arrayed in a dirty check shirt and a pair of loose, baggy trousers, which were prevented from falling off by a leather strap knotted about his waist. He was shivering and trembling from the effects of a debauch, and hardly had the strength to stand upright. When the judge asked him if he had anything to say, he rose up in a sort of disjointed way and demanded a jury-trial, which was granted, and when his turn came he advanced and began:—"Gentlemen of the jury, I stand here to-day less a defender of my own personal debasement than an example of human depravity, which, like a beacon light, should warn you from the rugged rocks of intemperance. A man in my condition is like a rude signpost I once saw in Tennessee, which pointed up a road over which the green grass was beginning to wave. On the sign was the inscription 'Small-pox,' and the index finger of a hand pointing westward. If any of you in travelling along a highway saw such a sign as that, you would pause upon the brink of deadly danger, and turn backward (sensation). In me you behold such a sign; and if by looking upon me any one of you can be turned back from destruction, I shall think that God in his infinite mercy has allowed me to fill a sphere of usefulness which shall enable me to bear with fortitude the imputation constantly hurled upon me by my own conscience, that I have lived in vain. Gentlemen of the jury, as you peruse the pages of the poets you will see how they have deified the wine-cup. They have wreathed it with the flowers of fancy, surrounded it with the halo of song, and peopled its bloody depths with the creatures of their own bright imaginations, until one might almost believe it to be the well-spring of human happiness, when bitter experience tells us in very different language that it is the fountain-head of misery, the abode of the demon that destroys our very lives. There is something which comes up in the fumes of the cup that fools call inspiration, but it is a cunning reptile, which, crawling up from the dregs of the grape, enters the window of the brain, and steals away, like a thief in the night, with our reason fast in its embrace. There is a hand in the wine-cup which, at any moment, may put forth its felon grip upon your throats and strangle you as a strong man might a babe. Gentlemen of the jury, I have not long to stay. Two mighty miners are delving on this lode — Time and Death. They are daily at their posts, working together side by side as one eternal shift, clearing away the rubbish of waste cork and pushing along the ledge. Before long I shall be gathered into the vast laboratory of Death, a piece of useless porphyry, to be cast into the waste dumps of hell." Here he pulled from his pocket a red handkerchief and began to sob. The old miners and the jury, moved by his forcible simile, broke forth into a simultaneous sob, in which the court, spectators, and prosecuting attorney joined. The jury were obliged to find him guilty, but recommended him to the mercy of the court. He was accordingly fined five dollars, which the jury paid on the spot, and the old man slid out of the door with the remark, "I knew I'd ketch 'em. Blast my buttons, didn't I work up the briny, though, didn't I?" A subsequent investigation led to the discovery that the bummer was an ex-actor from 'Frisco.—*Virginia City Chronicle.*

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Hilary Term, 40th Victoria.

DURING this Term, the following gentlemen were called to the Bar; the names are given in the order of merit.

Albert Clements Killam.
Thomas Hodgkin.
Cornelius J. O'Neil.
Francis Beverley Robertson.
Henry Ernest Henderson.
Hamilton Cassels.
Francis Love.
William Wyld.
Thomas Caswell.

The following gentlemen were called to the Bar under the rules for special cases framed under 39 Victoria, Chap. 3.

George Edmison.
Frederick W. Colquhoun.
Edward O'Connor.
John Bergin.

The following gentlemen received Certificates of Fitness:

J. H. Madden.
H. Cassels.
J. W. Gordon.
J. Dowdall.
C. J. O'Neil.
T. M. Carthew.
T. J. Decatur.
T. D. Cowper.
A. W. Kinsman.
C. McK. Morrison.
C. Gordon.
F. S. O'Connor.
G. S. Hallen.

And the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:

Graduates.

Charles Augustus Kingston.
John Henry Long.
James J. Craig.
William Fletcher.
Leonard Harstone.
Patrick Anderson Macdonald.

Junior Class.

Benjamin Franklin Justin.
John F. Quinlan.
John Williams.
Joseph William MacDowell.
Phillip Henry Drayton.
Thomas A. Gorham.
James R. Brown.
George J. Sherry.
Hector McKay.
D. Henderson.
Alexander Carpenter Brazeley.
John Bertram Humphries.
Lauren G. Drew.
Herman Joseph Eberts.
Solomon George McGill.
David Johnson Lynch.
Thomas Henry Loscombe.
John Vashon May.
George Moir.
J. H. Macallum.
Hugo Schliefer.
David Robertson.
Angus McB. McKay.
Charles Rankin Gould.
William James Cooper.
Edward Stewart Tisdale.
Francis Melville Wakefield
Alexander Stewart.
Thomas Miller White.
John Arthur Mowat.
Henry Bogart Dean.
George Robert Knight.
Humphrey Albert L. White.
John Wood.
George Benjamin Douglas.
Alexander Humphrey Macadams
Hugh Boulton Morphy.
William Henry Brouse.
George J. Gibb.
Frederick E. Redick.
William Masson.
Edward Guss Porter.
Thomas Robert Foy.
Henry Albert Rowe.
Thomas H. Stinson.
Stewart Masson.
Francis Evans Curtis.
William Steers.
Robert Taylor.
Henry M. East.
Armour William Ford.

Law Society, Hilary Term.

Wm. Martin McDermott.
Charles W. Phillips.
Wellington Smaill.
John Clyde Grant.
George Merrick Sinclair.
George Walker Marsh.
Edward Albert Foster.
Frank Russell Waddell.
Francis P. Conway.
Henry Dexter.
William T. Easton.
Albert Edward Wilkes.
James Lane.
John Henry Cooke.
Alexander Howden.
Douglas Buchanan.
John Alexander Stewart.
Arthur Mowat.
John McLean.
Robert Cockburn Hays.
William Aird Adair.
Ernest Wilbert Smith.
John Baldwin Hand.
James Barrie.
George Frederick Jelfs.

Articled Clerks.

Noble A. Bartlett
Owen M. Jones.
Eugene Maurice Cole.
Ernest Arthur Hill Langtry.
John Oberlin Edwards.
J. A. Loughead.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission as Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects:—

CLASSICS.

Xenophon Anabasis, B. I.; Homer, Iliad, B. I. Cicero, for the Manilian Law; Ovid, Fasti, B. I., vv. 1 300; Virgil, Æneid, B. II., vv. 1-317, Translations from English into Latin; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of quadratic equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; An examination upon "The Lady of the Lake," with special reference to Cantos v. and vi.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar. Translation of simple sentences into French prose. Corneille, Horace, Acts I. and II.

or GERMAN.

A paper on Grammar. Musæus, Stumme Liebe Schiller, Lied von der Glocke.

Candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), are required to pass a satisfactory examination in the following subjects:—

Ovid, Fasti, B. I., vv. 1-300,—or
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

A Student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk, (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

All examinations of Students-at-Law or Articled Clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

THOMAS HODGINS, *Chairman.*

Osgoode Hall, Trinity Term, 1876.

Adopted by the Benchers in Convocation August 29, 1876.

DIARY FOR JUNE.

1. Fri....Last day for delivering appeal books in Cour of Appeal.
3. SUN..1*st Sunday after Trinity.*
8. Fri....Law Society Convocation meets.
9. Sat....Easter term ends.
10. SUN..2*nd Sunday after Trinity.*
11. Mon..York Summer Assize.
12. Tues..General Sessions and County Court sittings, (ex-York).
17. SUN..3*rd Sunday after Trinity.*
20. Wed..Accession of Queen Victoria, 1837.
23. Sat....H. B. Com. Territory transferred to Dominion, 1870.
24. SUN..4*th Sunday after Trinity.*
26. Tues..Law Society Convocation meets.

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THE
Canada Law Journal.
Toronto, June, 1877.

The Court of Exchequer sat for the first time in Toronto last month, Mr. Justice Henry being the presiding Judge. He took occasion to say some few things about the Court House for the County of York. It is a pity the proper parties should not have heard the opinion of a stranger on the subject. It is certainly most discreditable to the county and city that nothing has been done "in the premises." The learned Judge read some new Rules of the Exchequer Court, which will be found in another place. After some appropriate compliments between the Bench and the Bar, the Court closed, the only case before it having been postponed by consent.

Mr. Edward Fry, Q.C., is the new Judge who has been appointed under the third Supreme Court of Judicature Act. As stated by the Chancellor of the Exchequer in the House of Commons, the new Judge is not to be an additional Vice-Chancellor, but an additional Judge of the High Court of Justice attached to the Chancery Division, but if expedient to be removed to another Division. His immediate duty will be to assist in clearing away the enormous mass of cases that are undisposed of in the Chancery Division. Practitioners in England, however, would seem, from the *Law Journal*, to have lost heart, and look upon the block as hopeless.

Law reporting in this Province is reaching a more satisfactory state. In the Common Pleas the cases are well up, and we suppose after this, the Reporter will be able to furnish some early notes of cases. In the Queen's Bench, where there has been much more work to be done, the arrears are rapidly dissolving before the industry of the Reporter; sixteen numbers, or a volume and a quarter, having been issued during thirteen weeks. Other numbers are ready to issue, and it is stated that all arrears are now in type, and will be issued before the next judgments are delivered. We have received from Mr. Wethey, and have published a number of notes of cases decided in his Court. In Chancery the leeway has been made up. We are also informed that the Practice cases up to the beginning of June are with the printer, and will be published, as also the Appeal cases to date, by the end of the month. The profession will be glad to see the cases up to date, so that the Reporters may apply themselves to a more systematic supply of early notes to be published in this journal, as directed by the Law Society.

THE LAW OF DOWER.

While the action, or plaint, for dower is almost unknown in England, this claim of the widow is a subject of frequent and difficult litigation in this Province. The judges and the legislators of Ontario have carefully preserved the ancient immunities of the widow, though the rights of married women have been for the last few years in a constant state of flux and change. The words of Lord Bacon, though no longer applicable in their entirety to England, are of full significance in Ontario. The tenant in dower, he says, is so much favoured, as that it is the common by-word in the law, that the law favoureth three things: (1) life; (2) liberty; (3) dower. It is somewhat singular that none of our law-writers have taken up this subject, which affords ample materials in the many modern decisions for a very useful and valuable treatise. Mr. Draper's book is now out of date, and at best was rather sketchy in character. In England, Mr. Park's book relates chiefly to ancient law and black letter cases; though very excellent and thorough, so far as it goes, it is half a century behind our requirements in Canada. The American work of Mr. Scribner is unnecessarily voluminous, and besides being badly arranged is filled with the manifold enactments and conflicting decisions of the various States of the Union. There is certainly a fine field for Canadian legal authorship in this region, and we hope that some competent student of our laws may regard it as a debt he owes his profession to embody his industry and research in a volume devoted to the law of dower.

There are in truth many anomalies, and many difficulties yet unsolved, and many decisions that cannot be reconciled to be met with in the investigation of this subject. It is held to be no objection to an action for dower, that the demandant has been in possession of the land since her husband's death, inasmuch as she has the right to have her dower specifically assigned: *Gilkison* v. *Elliott*, 27 U.C. Q.B. 95. The assignment of dower by the sheriff should be by metes and bounds; the heir may assign one-third in general of the estate, but in neither case is livery of seisin or any writing required, because, as it is said, dower is due of common right: *Fisher* v. *Grace*, 28 U.C. Q.B. 312. Therefore it has been held that as between the devisees and the widow a parol assignment of part of the land for the life of the widow in respect of her dower is good, and that such an agreement is not within the Statute of Frauds: *Leach* v. *Leach*, 8 Gr. 499.

A widow's claim to dower does not, in the absence of an assignment of dower out of the lands, give her an immediate estate in the lands, though she is in occupation of them, and ejectment is maintainable against her by the tenant of the freehold without demand of possession: *McEnally* v. *Wetherell*, 15 Irish C. L. R. 502. Against this is Sir Anthony Hart's opinion in *Lloyd* v. *Trimleston*, 2 Molloy, 81; see also *Talbot* v. *Scott*, 4 K. & J. 117. In this Province it has been held that the widow before assignment has not such an estate as a mere release can operate upon, and that a "quit-claim" deed to her so circumstanced was of no validity: *Acre* v. *Livingstone*, 26 U.C. Q.B. 282. From this judgment, Mr. Justice Hagarty dissented, and it cannot be said that the law on this point is settled. In *Collyer* v. *Shaw*, 19 Gr. 599, Strong, V.C., is reported as having disavowed his concurrence with the majority of the Court in *Acre* v. *Livingstone*, but the case is so baldly reported as not to carry much weight.

The right to dower, whether inchoate or consummate, is one of the few valuable interests which cannot be reached at law by execution to satisfy creditors: *Allen*

v. *Edinburgh Life Assurance Co.*, 19 Gr. 248; *McAnnany* v. *Turnbull*, 10 Gr. 298. In the latter case, Vankoughnet, C., argued thus: "Until the assignment, the widow merely has a right to procure dower; she is a mere stranger to the land and a trespasser, if she ventures on it; this right she may never assert; she may not choose to disturb the heir, or interfere with his freehold: and if she does not, who at law can do it for her? I asked in the argument if there was any instance to be found of an assignee of a dowery bringing a writ of dower in his own name. None such was shewn, and I am not aware of one." The point here is what can be done *at law*. For it had previously been decided in *Rose* v. *Simmerman*, 3 Gr. 598, that in equity, the widow may sell and convey her title to dower before assignment. This seems also to be the view taken, though with some hesitation, by Wilson, J., in the case of *Miller* v. *Wiley*, 16 C. P. 529, and again reported in 17 C. P. 369.

Whether a creditor can obtain equitable execution against the widow's right to dower before assignment is one of those nice questions which seems not to have been decided. Against it is the view presented in *Carrick* v. *Smith*, 31 U.C. Q.B. at p. 397; in favour of it is the course of decision in *Cottle* v. *McHardy*, 17 Gr. 342. Upon this matter it is not unreasonable that there should be legislative interference, so as to render this valuable right available to creditors, beyond peradventure.

But the strangest fluctuations of judicial opinion are to be found in the consideration of the question as to the rights against creditors of the widow who, during coverture, has joined in a mortgage to bar dower for the purpose of securing a debt of her husband. In *Sheppard* v. *Sheppard*, 14 Gr. 174, the Chancellor (Vankoughnet) held, that when the land in such a case sold for more than was sufficient to satisfy the mortgagee's claim, the widow was entitled to have her dower as of the whole value of the land out of the surplus in preference to the simple contract creditors of her husband. In *Thorpe* v. *Richards*, 15 Gr. 403, the same judge was of opinion that he had gone too far in the former case in giving the widow the value of her dower out of the entire estate to the prejudice of her husband's creditors. This change of view was adopted, and followed out into an actual decision by Mowat, V.C., in *White* v. *Bastedo*, 15 Gr. 546, where he decided that the widow had no equity to have the mortgage debt paid out of the general assets, as against the simple contract creditors, so as to set the land free to answer her dower. The law was laid down in the same way by the same Vice-Chancellor in *Baker* v. *Dawbarn*, 19 Gr. p. 118. And in *Campbell* v. *Royal Canadian Bank*, 19 Gr. p. 341, Spragge, Chancellor, said: "I think it must now be taken as settled that, as between the widow and creditors, she is dowable only in respect of the value of the land in excess of the incumbrance, *i. e.* of course, in a case where she is bound by the incumbrance. But lately, we understand the same question again arose in *Re Robertson*, (not yet reported), and Proudfoot, V.C., came to the conclusion that the judgment in *Sheppard* v. *Sheppard*, right and correctly expounded the law All this is unsatisfactory.

CURIOSITIES AND LAW OF WILLS.[*]

It is easy enough to prepare such a will as, "All to wife," or, "Dear Polly, wen I ave gon, hall I av belongs to you, my dear Polly;" as soon, however, as one gets beyond these laconic documents

[*] The Curiosities and Law of Wills. By John Proffatt, LL.B., author of "Women Before the Law," &c., (Vol. II. of Legal Recreations). San Francisco: Sumner, Whitney & Co. 1876.

and begins to give something to the little ones, or to provide against the time when Polly, too, will shuffle off this mortal coil, the every-man-his-own-lawyer amateur begins to stumble and fall, even the professional reader of Swinburne occasionally becomes involved, and if, perchance, he is arranging his own affairs is very apt to provide business for his own successors at the Bar. For proof of this last statement we need only refer to the note to Hayes and Jarman's Concise Forms of Wills, where a catalogue containing the names of no less than fifteen legal luminaries is given, all of whom blundered over their own wills. On that black list we find such names as Mr. Sergeant Hill, Sir Samuel Romilly, Chief Justice Holt, Chief Justice Eyre, Sergeant Maynard, Baron Wood, Mr. Justice Vaughan, Vesey, Jr., the reporter, Preston, the conveyancer, and Lord Westbury. A Canadian list of similar defaulters might be begun, (32 Vict. (O.) cap. 74.)

The object of the little book under notice is not merely to entertain, but by reference to apt and striking cases to illustrate and expound the principles and rules of law relating to wills, and provide a systematic, clear and concise summary for the student and the practitioner, and an interesting volume for that fastidious individual—the general reader. It seeks not to supplant Jarman or Hawkins, Theobald, Redfield or Walkem, but to afford a manual which may serve as a refresher to minds weary of heavy reading, and give non-clerics a glimpse into the bewildering mazes in which last wills and testaments are involved and of the shadows that seem ever to group around them. Well and successfully has the author accomplished his task, and a great boon has he conferred upon his long suffering and heavily-laden-with-cumbrous-law-books confreres. His style is attractive and clear. The publisher, too, has well done his task, for it is a dainty little book, more like a volume of poetry than of law, printed—as it is—on tinted paper and tastily bound in muslin.

The making of a will is one of the most solemn acts of a man's life—hence the insertion of so many good words and pious ejaculations. Yet, solemn as the occasion is, many take advantage of it to freely speak their minds, to vent their spleen on ungrateful friends, to deride an unfeeling world, to give a last utterance to notions, eccentricities and prejudices. 'Tis well nigh impossible to predicate what may not be found in last wills and testaments. Some testators who, while able to retain their wealth, would not give even a cup of cold water to a beggar, leave enormous sums (which they know would be assuredly cremated if taken with them into another world) to endow a college, found a hospital, build a church; others leave their nearest and dearest to starve, while they bequeath millions for the benefit of far distant savages. Some wills are remarkable for their conciseness and perspicuity; others for their twisting and contortions; some for their great piety and contempt of things mundane; others again for their acidity, cynicism, shrewdness or humor. One man provides for a church, another for his dog; while a lady pensions off her dear and amusing Jacko, her faithful Shock, and her well-beloved Tib—monkey, dog, and cat, respectively, (p. 78). An Oxford professor left money to his executors to have his corpse skinned, the skin tanned, and then on it to have printed the Iliad and the Odyssy of the immortal Homer: Jeremy Bentham gave his body to the surgeons for dissection; while a third genius directed that his executors should "cause some parts of his bowels to be converted into fiddle strings, that others should be sublimed into smelling salts, and that the remainder of his body should be vitrified into lenses for optical purposes:" *Morgan* v.

Boys. One benevolent old gent left his money to portion off deserving old maids and let his own daughters pine in single blessedness for want of portions; another gave his property to set up a life-boat: *Johnson* v. *Swan*, 3 Madd. 457, and compelled his sons to paddle their own canoe; another gave his estate to plant a botanical garden, leaving his daughters to droop and fade away as wall-flowers: *Townly* v. *Bedell*, 6 Ves. 194.

Mr. Proffatt has in his introduction given us a number of extracts from curious wills, culled chiefly from the Records of Doctor's Commons, as given in the *Illustrated London News* some three or four years ago. A few of these will be good reading for this midsummer weather.

A Mr. Zimmerman had decided views on the subject of funerals; in his will he says, "No person is to attend my corpse to the grave, nor is any funeral bell to be rung, and my desire is to be buried plainly and in a decent manner, and if this be not done, I will come again—that is to say, if I can." The Countess of Sandwich directed that at her funeral there were to be "no undertaker's frauds or cheating, no scarfs, hat-bands, or nonsense." She evidently had Byron's idea, that in mourning coaches there's a deal of fun when the funeral's done.

Mr. J. W. Freshfield was so fearful of being interred alive, that by his will, proved in the last decade, he desired that previous to his burial his body should be opened, the heart effectually separated and then returned to its original position. Another testator for the same reason directed his heart to be pierced through with a red-hot iron.

Henpecked husbands often say in their wills what they have often thought but never dared to utter *viva voce*. Our author gives an interesting excerpt from the will of that broken-hearted man, whose wife heaven sent into the world solely to drive him out of it; of her the poor wretch writes: "The strength of Samson, the genius of Homer, the prudence of Augustus, the skill of Pyrrhus, the patience of Job, the philosophy of Socrates, the subtilty of Hannibal, the vigilance of Hermogenes, would not suffice to subdue the perversity of her character."

But for the credit of humanity, we are glad to be able to say that some wills bear testimony in the strongest and most affectionate language to the virtues and excellencies of wives. Mr. Sharon Turner, the eminent author of "The History of the Anglo-Saxons," in his will says of his dead wife: "None of the portraits of my beloved wife give any adequate representation of her beautiful face, nor of the sweet, and intellectual, and attractive appearance of her living features, and general countenance and character." While Mr. Granville Harcourt, who died in 1862, thus speaks of his living spouse: "The unspeakable interest with which I constantly regard Lady Waldegrave's future fate induces me to advise her earnestly to unite herself again with some one who may deserve to enjoy the blessing of her society during the many years of her possible survival after my life; I am grateful to Providence for the great happiness I enjoy in her singular affection." Mr. Harcourt was equalled by Mrs. Van Hennigh, who, after bequeathing to her husband all her property, and directing him to sell her old clothes to pay her funeral expenses, adds in her will, (proved in 1868), "It is also my earnest wish, that my darling husband should marry, ere long, a nice, pretty girl, who is a good housewife, and above all, to be careful that she is of a good temper." What a contrast do these last two wills present to the churlish stipulations anent the wife marrying again that one finds in so many wills!

Our author says that he cannot call to mind a single case in which a married

woman has sought by her will to restrain her husband from entering, for a second time, into the holiest of bonds, and he gives what would be a good reason if a correct one, viz., that they have not the privilege of doing so. He may be right in his statement of fact, for *Allen* v. *Jackson*, 1 Ch. D. 399, in Appeal, which decides the incorrectness of his law, was a case where a man's mother-in-law endeavored to keep him true to her daughter's memory.

We are favored with an extract from a will, which might form a useful precedent in these days, when bulls and bears run riot in the stock exchange; it speaks of heaven as a place "where there are no railways nor monetary panics, nor fluctuations in exchange." The well-known will of the Earl of Pembroke is given *in extenso*: some of the bequests are particularly good, especially where he gives nothing to Lord Saye, knowing that he will faithfully distribute it unto the poor; and to Lieutenant-General Cromwell, one of his (Pembroke's) words, the which he wanted seeing that he (Cromwell) had never kept one of his own; and the conclusion, "Item, I give up the Ghost."

A good portion is given of the first will in the English tongue, registered in Doctor's Commons, that of Lady Alice West, dated "the xv day of the month of Jul in the yer of the incarnacion of our Lord Thee Crist, a thousand and thre hundred and foure score and fiftene." She, among other bequests, proceeds as follows: "I devyse to Thomas, my sone, * * * my best fether bed, and a blue canevas and a materas and twey blankettys and a peyre schetes of reynes and sex of my best pilwes." Her Ladyship was religious, and gave £18. 10, "for to synge and saye 4400 masses for my lord Sir Thomas West is soule, and for myne, and for all Cristene soules," to be "done within fourtene nights after her deces." Cheap masses these, only a penny apiece!

The Introduction concludes with excerpts from the wills of William Shakespeare and Henry VIII. The poet gave nothing to his wife, save his "second best bed with the furniture."

Our author does not give us any poetical wills, although there have been several such proved. For instance, one of Mr. John Hedges', beginning:

"The fifth day of May,
Being airy and gay,
And to hyp not inclined
But of vigorous mind,
And my body in health,
I'll dispose of my wealth."

M. Darley inserts the date in his in the following words:

In seventeen hundred and sixty nine,
This with my hand I write and sign
The sixteenth day of October.
In merry mood, but sound and sober,
Past my three score and fifteenth year,
With spirits gay and conscience clear;
Joyous and frolicksome, though old,
And like this day serene, though cold.

One widow, Monica Sweeney, got off the following:

For this I never will repent,
'Tis my last will and testament;
If much, or little, nay, my all,
I give my brother Matthew Gall,
And this will hinder any pother
By sister Stritch or Mic my brother.
Yet stop: should Matt die before Mic,
And that may happen, for death's quick,
I then bequeath my worldly store
To brother Mic for evermore.
And should I outlive my brothers,
It's fit that then I think of others.
Matthew has sons and daughters, too,
'Tis all their own, were it Peru.
Pray, Mr. Forest, don't sit still,
But witness this as my last will.

Having whetted the appetites and tickled the palates of his readers by these curious productions, Mr. Proffatt brings on the substantials in his bill of fare—each dish, though highly seasoned, is most pleasant to the taste, very nutritious and easy of digestion; or, to be more literal he gives us eight most readable chapters, in which he treats of the origin and

history of wills, their form and essentials, testamentary capacity, legacies, limits of disposition, revocation, the law of domicile and rules of construction.

(To be continued.)

BENCH AND BAR AT THE ANTIPODES.

A copy of the *New Zealand Jurist* for February, 1877, is before us. In addition to usual editorial and selected matter it appears to be the recognised medium for reporting. This number seems devoted, rather than otherwise, to a general castigation of the Bench, with especial reference apparently to the Court of Appeal. We can hardly suppose that a barrister of the Middle Temple, the editor of a recognised organ of the profession, would write in the strain he does without some good reason. We are not sure that a freer criticism upon judicial utterances in this country might not occasionally have a good effect. In England it is the rule rather than the exception. The difficulty with us lies in the danger of lowering the office in the eyes of the public, especially in a country which lies so near a people whose levelling tendencies are so notorious. We need say nothing of the almost impossibility in a small community of securing the impersonality of the press, and consequent unpleasantness, where the writer must of necessity, in a country like this, constantly appear, professionally, before the judge whom he has been criticising.

Our friend from the antipodes thus discourses of the Chief Justice of New Zealand :

"A Chief Justice is usually supposed to be the master mind of the Court in which he presides; and, as a matter of fact, he usually is. It is also usually considered that he is entitled to take precedence of his brethren in all matters coming before the Court; and, as a matter of fact, he usually does. The Chief Justice of New Zealand forms a singular exception to the rule. Evidently moved by excessive modesty, he takes pleasure in yielding precedence to his brethren, making no pretension to sway the legal realm of which he is the titular monarch."

The Court catches it in the following, and apparently not without reason :

"The judgment of the Court of Appeal in *Webb* v. *The National Bank* has occasioned a good deal of surprise. In the first place, the Court arrests the judgment without costs, but no reference is made by their Honours to Rule 363, which contains an express provision as to costs in these cases. The result is that the plaintiff gets the costs of the trial, and the defendants—the successful party—have to pay their own costs throughout. If this Rule did not escape their Honours' attention, on what grounds did they ignore it?"

"It is just as well that the litigant public know nothing of the manner in which their business is blundered in the Courts. Two remarkable instances present themselves in the present number of the Jurist. In *Bird* v. *The National Bank*, the defendants omit to plead privileged communication; and when they apply for leave to amend at the trial, the learned Judge refuses the application, for reasons which seem a good deal worse than the ruling. Which are we to admire most—the pleader or the Judge? In *Webb* v. *The National Bank*, the spectacle is still more ludicrous. After a lengthy trial, and two elaborate arguments of the inevitable rule *nisi*, it is discovered by their Honours in the Court of Appeal that the plaintiff has no status entitling him to sue, by reason of a technical error in the vesting order obtained under the Trustee Act, for the purpose of enabling him to sue. This discovery has probably cost the parties not less than £1,000."

From which last remark we assume that the judges there are more liberal than they are here in the way of costs.

The leading article discusses what is called "another loose proceeding" on the part of the Court in a case of infanticide, where the question of the *corpus delicti*, *&c.*, came up. We should imagine, either that this plucky Editor has very little business, and does not want any more, or that the Judges of the Court are blessed with sweeter tempers than fall to the lot of most of the Judges that we know of.

SELECTIONS.

NEUTRALITY.

Neutrality, as Lord Chief Justice Cockburn explained at Geneva, is not a mere continuance of pacific relations with the belligerents, but a *status* involving special and important obligations. The Proclamation issued on Monday night sets forth several reasons for the due observance of those obligations. There are numbers of Her Majesty's subjects who reside and carry on commerce, and possess property and establishments, and enjoy various rights and privileges within the dominions of the belligerent sovereigns, who are protected by the faith of treaties, and who would no longer be entitled to such protection if pacific relations ceased; and the non-observance of neutrality, at least when such non-observance is sanctioned or connived at by the Government, is a *casus belli*; and this is intimated in the next paragraph of the Proclamation, which assigns, as a ground for maintaining a strict and impartial neutrality, the desire of preserving to this country the blessings of peace. Another reason for being faithful to the obligations of neutrality is that England has always claimed to exercise the belligerent rights which we now concede to Russia and Turkey. Thus, the bargain is not altogether one-sided. True, the belligerent gives the neutral no direct compensation for the exercise of those belligerent rights which interfere with the commerce of the neutral; but, on the other hand, the belligerent continues, in time of war, to protect the persons and property of neutrals within his jurisdiction; and, further, the neutral only suffers the inconvenience and injury that he will inflict on other nations when he is a belligerent. In a word, neutrality is not only the duty, but also the interest of the neutral. The Alabama affair is a warning not to be neglected by a neutral Government. The Act 33 & 34 Vict. c. 90—which is 'An Act to regulate the conduct of Her Majesty's subjects during the continuance of hostilities between foreign States with which Her Majesty is at peace,' and which repeals the 59 Geo. III. c. 69—is an evidence of the desire of the country to fulfil the obligations of neutrality; and it is noteworthy that the Act was in force during the war between Germany and France, and that during that war England was not guilty of such breaches of neutrality as called for the remonstrances of either of the belligerent Governments. The Proclamation of Her Majesty, and the letter of the Foreign Secretary to the Lords of the Admiralty, and other departments, are evidences that the Government intends to exercise due vigilance. We may here remark that it is necessary for the Government to observe the rights of the belligerents, in order that it may be in a position to protect neutral rights; such as the rights accruing under the Declaration of Paris, the right to use a port that is not *effectively* blockaded, and we apprehend the right of transit by water-way to the territories of other neutrals. Among the few settled principles of international law is this, that no nation has a right to do anything to injure another; and though, as we have remarked, a belligerent may, and is allowed to, inflict some direct as well as indirect injury on neutrals, the foregoing fundamental principle is still so far in force that the rights of the belligerent in derogation of it are definite and limited. For example, the right of the belligerent to prevent neutral commerce with his foe is incontestable; but he cannot exercise that right by a mere prohibition, or in some way that is convenient to himself, but which inflicts needless injury on neutral commerce. Thus, a port is not blockaded by a mere announcement of the blockade; for the object of the declaration of blockade is only to give neutrals proper and requisite notice that they must cease to trade with that port. What constitutes a blockade is an effective blockading force. A mere paper blockade would be a loss to the nation which observed it, and a gain to the nation which disregarded it. And, further, to treat a paper blockade as a real blockade would be a breach of neutrality; for, why should the neutral treat the port of a belligerent as blockaded when it is in fact open? It might be convenient for Turkey to blockade the Danube; but why should the commerce between neutrals be interrupted in order that Turkey may be spared the trouble of ascertaining whether the vessels using the Danube are or are not engaged in a neutral traffic? The neut-

ral has to assert the rights of neutrality as well as to fulfil its duties.

The Proclamation does not make the law, but is a declaration of the law. The Proclamation does not suggest that the Act was in abeyance, for it says: 'Now, in order that none of our subjects may unwarily render themselves liable to the penalties imposed by the said statute, we do hereby strictly command that no person or persons whatsoever do commit any act, matter, or thing whatsoever contrary to the provisions of the said statute, upon pain of the several penalties by the said statute imposed, and of our high displeasure.' The Proclamation is a recital of the law, and an admonition to obey it; and the preamble only sets forth the reasons for issuing it. But though a proclamation of neutrality is only declaratory of the law, it alters the position of the shipbuilder; for the Act provides that 'a person building, causing to be built, or equipping a ship in any of the cases aforesaid, in pursuance of a contract made before the commencement of such war as aforesaid, shall not be liable to any of the penalties imposed: 1. If forthwith upon a proclamation of neutrality being issued by Her Majesty he gives notice to the Secretary of State that he is so building, causing to be built, or equipping such ship, and furnishes such particulars of the contract and of any matter relating to, or done, or to be done under the contract as may be required by the Secretary of State.' 2. If he gives such security, and takes and permits to be taken such other measures, if any, as the Secretary of State may prescribe for insuring that such ship shall not be despatched, delivered or removed without the license of Her Majesty until the termination of such war as aforesaid.' This does not assert that the work of building or equipping is lawful even on a contract entered into before war, after war is commenced; but that, in such a case, the person offending against the Act—that is, illegally building or illegally equipping after the commencement of war and before the Proclamation of neutrality—shall be free from liability to the penalties if he complies with certain conditions when the Proclamation is issued. The law is prohibitory, not mandatory. The neutral obligation is not to do anything, but to abstain from certain acts that would aid and abet either of the belligerents. Neutrality is not mere impartiality. Equipping ships of war for both belligerents is not neutrality. For many reasons, which we need not specify, the law of neutrality prohibits the neutral from giving either belligerent any aid. The Act forbids enlistment in the service of any foreign State at war with any foreign State at peace with Her Majesty; leaving the Queen's dominions with intent to take such service; inducing any person to quit the Queen's dominions, or to embark on any ship within the Queen's dominions, under a false representation, of the service in which such person is to be engaged, with the intent or in order that such person may accept, or agree to accept, any commission or engagement in the military or naval service of any foreign State at war with a friendly State; taking persons illegally enlisted on board a ship; illegal shipbuilding, or illegal expeditions —that is, building a ship for a belligerent that is to be used as a ship of war, or fitting out a warlike expedition—aiding the warlike equipments of foreign ships; and any person who aids, abets, conceals, or procures the commission of any of the offences against the Act, is liable to be tried and punished as a principal offender. No one can complain that the Act is not comprehensive with respect to the offences and also to the offenders.

The Act deals mainly with offences that are, by that Act, violations of the municipal law, as well as breaches of neutrality. The Proclamation also refers to breaches of neutrality that are not municipal offences, and that are not punishable by our courts. The non-municipal offences are breaking, or endeavouring to break, any blockade lawfully and actually established by or on behalf of either of the said sovereigns, by carrying officers, soldiers, despatches, arms, ammunition, military stores or materials, or any article or articles considered and deemed to be contraband of war according to the law or modern usages of nations, for the use or service of either of the said sovereigns. What is the penalty for such offences? The Proclamation says: 'All persons so offending, together with their ships and goods, will rightfully incur, and be justly liable to, hostile capture, and to the penalties denounced by the law of

nations in that behalf. And we do hereby give notice that all our subjects and persons entitled to our protection who may misconduct themselves in the premises will do so at their peril and of their own wrong; and that they will in nowise obtain any protection from us against such capture, or such penalties as aforesaid, but will, on the contrary, incur our high displeasure by such misconduct.' The trade in contraband is not unlawful—at least not municipally unlawful—but it is carried on at the risk of the trader and of all concerned in it. The neutral sovereign warns her subjects that if they commit any breach of neutrality which is not a breach of municipal law, though a breach of the law of nations, they will forfeit the protection of their own Government, and will be liable to the penalties decreed by the law of nations. It would no doubt tend to shorten wars if the municipal law were made coextensive with the law of nations, and could be enforced; for then the belligerents would be cut off from all foreign supplies, and their means of continuing the conflict would be limited to their own stores and resources. But it would be difficult to devise an Act that would make the municipal law coextensive with the law of nations in respect to neutrality; and, further, it would be utterly impossible to prevent the breach of such a law. No legislation and no vigilance on the part of neutral Governments can stop trade in contraband. The neutral Government is fortunately only responsible for those breaches of neutrality which are also breaches of its municipal law, and which it ought to have prevented by due vigilance.—*Law Journal.*

RUFUS CHOATE.

Although endowed with great intellectual powers, Mr. Choate was as careful, methodical and solicitous in regard to mental helps as any student who might have been less conscious of innate strength. He would seem to have been mindful that the summit of excellence was to be approached by a road open to all; that those who could pass on easily and swiftly, and those less favored by nature, but of superior diligence, might finally reach the same destination. Thus, regarding genius as a mere capacity to acquire knowledge and to use it, he gave himself up to continuous toil.

Some perils attend students who possess great intellectual powers. From the hour when such a one first realizes how receptive he is to suggestions of truth and beauty, how readily the barriers which impede others yield to his touch, he is liable to become the victim of a delusive self-confidence, and to accept the notion that the harmony and fruitfulness of his life will be of spontaneous growth. As he seems to apprehend the less occult relations of things by intuition, he regards close and prolonged study as unnecessary. So, content with some appearance of culture, he falls into easy ways, goes through life as the lounger saunters through the streets. He bears to true learning the relation which the slothful miner has to the mine as he gathers up the bits of precious metal exposed to view, without acting upon the hints nature has given of the wealth hidden below the surface. Another student, of like gifts, moves on earnestly, acquires knowledge, does some good work. Having found that what he should learn is easily attained, he assumes that there need be no end to his acquisitions. Like the student in Faust, he confers with the evil spirit, and is encouraged to enquire into mysteries too deep and profound for his apprehension. He takes to such studies, and, thenceforth, swims not with the current but against it. He is vain, superficial, weak in proportion as he shakes off the influence of natural laws, the checks and hindrances designed to hold him in restraint, and which are as necessary for his safety as the wall built at the edge of the precipice, or of the road by the river is for the protection of travellers. He undertakes to inform the schoolmen in their specialties, and his speculations upon religion, science, the nature and relation of man, partake of the artificial texture of his life, but they are printed and in the hands of inquiring readers. As he has performed some good work in other departments, his speculations secure respect and confidence. So his best efforts have an evil influence.

As Mr. Choate escaped the perils which beset students in their early growth, it would be interesting could we know to what that good fortune may be ascribed.

Some may refer it to the incentives of ambition, of self-respect, of pride, taste or temperament, and such incentives may enter largely into the question. But in this instance beneficent influences acting upon a delicate, docile, susceptible, emotional nature, had been at work in advance of the schools. The boy went into those schools with his mind stored with good examples. The family training had given a proper bias to the affections; lessons from the Bible, from Watts' hymns and psalms, from the church service, from the poets and from history, had inspired a love of the true and beautiful, and he had read enough of biography, of travels, to impress him with the dignity of earnest efforts, self-sacrifice and heroism. The case is not thus stated too strongly. What should be said of the strength and maturity of one who, as Professor Brown tells us, had devoured the "Pilgrim's Progress" before he was six years old, had nearly exhausted the village library before he had reached his tenth year; whose taste and delicate sense of the use of words were such that when nine years of age he could point out an inappropriate word in a discourse? The preacher, after citing Paul, had added, "Even James says, etc." The young critic thought that the word *even*, as thus used, implied some disparagement of the Apostle James. But, without extending these statements, it is apparent that young Choate went out into the world with large moral and intellectual preparation. He carried the devotion, the genial spirit of his home life into the schools. The light of the early love never faded from his brow. He was thus prepared to exercise the manly patience given to his riper studies. The methods observed, as he sought to store his mind with lessons of the ancient and modern prudence, with such examples, maxims, images, analogies, such conceptions of principles as should enlarge his range of thought, enrich and vivify his language, chasten his style and make his public ministrations more efficient and acceptable, deserve the attention of students.

Mr. Choate knew the need and use of study; he also knew the limitations which were to be respected. A conservative spirit held him in restraint, repressed longings to slake his thirst at fountains placed beyond his reach. With firmness and prudence he refused to follow a friend into the labyrinths of German mysticism or to explore the extended domains which Swedenborg had made his own. This economy was becoming in him, not simply because he did not wish to be "shocked, waked, or stunned" out of settled convictions, but because the duties before him, with the related studies, would consume his time and strength. Whatever his estimate of his own powers might have been, he knew that the Universal Genius, so called, was as fabulous as the Scandinavian Troll or as the Schamir, the worm that ate stone, and which, according to a Jewish superstition, had been used in preparing the stones for Solomon's Temple. So he put by studies that seemed too remote from his purpose, as ostentatious or improvident. He never lost his balance by reaching out too far, or, like one of old, walked into the water while gazing at the stars.

Mr. Choate's study of the cases in which he was to appear as counsel was exhaustive. Each case was tested and tortured until every conceivable shade of strength and of weakness was revealed. His son-in-law, Mr. Bell, has described the method, and Judge Fancher's statement of the preliminary examinations of the case in which Mr. Choate was associated with him, is of a like character. He studied the cases, pen in hand. The facts and qualifying circumstances, with the decisions and principles applicable, were noted in a little book. A like book was kept by Erskine. Mr. Espinasse says that Erskine brought his arguments into court in a little book, and even after long experience as a barrister, used to read and cite cases from it. On one occasion his opponent affected to ridicule that method, and, with a sneer, said he wished Erskine would lend him his little book. Lord Mansfield said "it would do you no harm, Mr. Baldwin, to take a leaf out of that book, as you seem to want it." Mr. Erskine may have been in the habit of citing cases from his memorandum books to a greater extent than Mr. Choate. He thus used his book in debate when he claimed that the trial of Warren Hastings had ended with the dissolution of Parliament. Edmund Burke, not able to control his temper when excited by opposition of any kind in reference to that trial, had a

fling at "ideas which never travelled beyond a *nisi prius* case," and a sneer for the note book. But in this relation it is pleasant to recall the spirit in which, a short time before his death, Burke called on Erskine, and holding out his hand said, "Come, Erskine, forget all! I shall soon quit this stage, and wish to die in peace with everybody, and especially with you." But we confess that we have always had great respect for Mr. Choate's little books as evidencing the care given to the preparation of his cases, the security against possible confusion or forgetfulness. How else could counsel who goes into the argument of case after case on the same day, do full and exact justice to each of them? It is said that Sugden once got hold of the wrong brief, and argued in support of his adversary. A like mistake is reported of Dunning. Neither of them had kept the little books. Neither did our former attorney-general, Samuel A. Talcott, who made a like blunder. As he was about to close, the attorney of the party came into court and in a troubled whisper told him of his mistake. Not at all disconcerted, and artfully concealing his error, Mr. Talcott re-arranged his papers and said: "May it please the court, I have thus presented fully and fairly, the case as understood by my learned friends opposed. I shall now proceed to show that that view of the case is utterly erroneous." The late B. Davis Noxon, who was present, told me that the promise was made good; that the argument that followed was one of the most able and brilliant he ever heard from that distinguished counsel.

Mr. Choate's study of the law, apart from his preparation in particular causes, and from those in which he had been concerned, was extraordinary. In the range of legal biography to which we have had access, we do not recall an instance of equal devotion. His methods of noting the facts of cases reported in the books, and writing out opinions, as if for judicial use, of preparing arguments in support of the decisions or against them, of criticising the authorities cited, and finding others to confirm or qualify them, of seeking to discove how far a doctrine underlying a series of adjudications might have been fortified or made to appear more just in the light of history, reason, and of scientific tests, have been from time to time so fully stated in this Journal that present illustration is unnecessary. Such a course of study, so close, symmetrical, critical, deserves great respect. But an entry here and there, in his diary and journal, as he notes how he applied his morning hour, seems articulate with admonitions. He has a few moments with the poets, with historians, with the critics, and then the genius of the law beckons him away. Thus, he says, "I have read and digested a half-dozen pages of Greenleaf on Evidence, and as many of Story on the Dissolution of Partnership;" and, later, "I read Phillips' Evidence, beginning at title 'Incompetency,' and commonplaced a reference or two;" and, yet again, later, and while in London, after saying, "Mr. Bates called and made some provision for our amusement," he adds, "I read bible, prayer book, a page of Bishop Andrews' prayers, a half dozen lines of Virgil and Homer, and a page of Williams' Law of Real Property." All this and more, to keep the law, even in its simplest elements, fresh in mind, a purpose from which not even the delights of travel, of new scenes, of courteous fellowship, could wholly divert him.

The fruit of such devotion was wholesome and nutritious. Thus trained and strengthened, his vision could take in, as from a tower of observation, the domain of the law. It lay before him as a familiar and inviting landscape. The practical benefit was obvious. On a trial or an argument, when unexpected difficulties might arise and an appeal be made to principles and noted in his "little book," the countervailing doctrine was in his mind ready for use.

The law thus faithfully pursued, leads to logic, to ethics, to metaphysics, and in a word, to the whole scope of special sciences. Even such views of it may not indicate adequately, certainly not with precision, Mr. Choate's estimate of the law as pervading all space, and subordinating to its use all knowledge. If so, that estimate may reveal to us the reasons which led him to more enlarged and liberal studies than are commonly regarded as necessary to the profession.

—*Am. Ex.*

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH.

[Dec. 29, 1876.

Regina v. Jackson.

Indictment for obstructing highway—Previous conviction—Estoppel—Costs—Fine.

Where a defendant had been convicted of nuisance in obstructing a certain highway by a fence, and after removal of such fence by the thing under process, replaced it upon the same highway, though not precisely in the same line as before:—*Held*, that the former conviction was conclusive against the defendant as to the existence of the alleged highway, and that he could not again raise the question on this.

Where the indictment was removed into this Court *by the prosecutors*: *Held*, that the defendant was not liable to costs; but the Court ordered that one-third of the fine imposed should go to the prosecutors, and suggested that the Government might on application order the remaining two-thirds to be paid to them, the whole fine being less than the costs incurred.

Ferguson, Q.C., for Crown.
M. C. Cameron, Q.C., for defendant.

Regina v. Portis and Gilbert.

Forgery—Evidence.

On an indictment for feloniously offering, &c., a forged note commonly called a Provincial note, issued under the authority of 29 & 30 Vict. cap. 10, D., for the payment of $5. It appeared that the prisoners had passed off a note purporting to be a Provincial note under the statute, knowing that the figure 5 had been pasted over the figure 1, and the word five over the word one. No evidence was given that the note so altered was a note issued by the Government of Canada, but it was shewn further, that when the attention of the prisoners was called to the alteration they said "give it back if it is not good," and that on its being placed on the counter one of them took it up and refused to return it, or substitute good money for it. *Held*, that looking at the particular character of the forgery—*i. e.*, an alteration—and the conduct of the prisoners, the onus was on them to dispute the validity of the writing; and the conviction was sustained.

J. K. Kerr, Q.C., for Crown.
Glass, Q.C., for prisoners.

Regina v. Starr.

Larceny—Recent possession—Evidence.

On an indictment for stealing cooper's tools on the 5th of November, 1874, it appeared that the prisoner was not arrested for nearly two years afterwards. During that time—it was not shewn precisely when—he was proved to have sold several of the tools at much less than their value, representing that he was a cooper by trade, and was going to quit it, which was proved to be untrue: that he was in the shop from which the tools were stolen the night before they were taken, and frequently; and that when arrested he offered the prosecutor $35 to settle and buy new tools, and offered the constable $100 if he could get clear.

Held, that though the mere fact of the possession by the prisoner, after such a lapse of time, might not alone suffice, yet that all the facts taken together were enough to support a conviction for larceny.

J. K. Kerr, Q.C., for Crown.
No one appeared for the prisoner.

In Re Bates.

Conviction—Certiorari—38 Vict. cap. 4, O.—By-law.

In the case of a conviction for an offence not being a crime, affirmed on appeal to the Sessions, the writ of *certiorari* is not taken away by the 38 Vict. cap. 4, O.

Where the conviction purported to be for an offence against a by-law, but shewed no such offence, it was quashed; and it was held, that it could not be supported as warranted by the general law.

Osler for the applicant.
M. C. Cameron, Q.C., for the convicting magistrate.

Parkinson v. Higgins.

Mortgage of vessel—Purchase by mortgagee—Loss of vessel—Right to sue for mortgage money.

Declaration on defendant's covenant by deed to pay money. Plea: that the deed mentioned was a mortgage and re-conveyance of a vessel sold by plaintiff to defendant, to secure the purchase money therefor; and that while the plaintiff was mortgagee the said vessel and all defendant's interest therein was sold, and the plaintiff became the absolute owner of said vessel, whereby the mortgage became merged and satisfied. Replication, on equitable grounds,

that the vessel, being a British ship, was seized for wages due to the crew, and sold at Detroit, in the United States, solely through defendant's default: that by the law of the United States the wages formed a lien prior to the mortgage, and the plaintiff, wholly to protect himself, and not to gain any advantage over defendant, became the purchaser: that he offered and was always willing to reconvey and deliver her to defendants on being paid the mortgage money and the sum paid by him at such sale, which defendant refused to pay: that the plaintiff, having possession of the vessel, insured her, and on her loss by the perils of the sea received the insurance money, which the plaintiff is and always has been ready to apply on the purchase money.

Held, on demurrer, affirming the judgment of Gwynne, J., a good replication, for that the plaintiff, under the circumstances stated, was not precluded from recovering on the covenant.

Ferguson, Q.C., for plaintiff.

H. J. Scott, for defendant.

REGINA v. COOPER.

Indictment for obstructing highway—Costs—5-6 W. & M. cap. 11—Fine.

A township municipality prosecuting an indictment for obstructing a highway in the township, which indictment had been removed on defendant's application into this Court, and the defendant convicted thereon: *Held*, to be "the party aggrieved" within the 5-6 W. & M. cap. 11, sec. 3, and the defendant, having to pay their costs and his own, amounting to over $400, was fined only $1.

Badgerow for Crown.

No one appeared for defendant.

[Jan. 2, 1877.

HALLETT v. WILMOT AND BROWN.

Action against Magistrates—Pleading—Damages.

A count alleging that defendants were justices of the peace, &c., and assuming to act as such justices, but without any jurisdiction or authority in that behalf, caused a distress warrant to be issued against the plaintiff's goods for $56, which they had adjudged the plaintiff to pay under and by virtue of a certain conviction made by them without any jurisdiction, and caused the plaintiff's goods to be sold thereunder, which conviction was afterwards duly quashed on application of the plaintiff to this Court, whereby the plaintiff lost the use and value of his goods, and was put to costs in getting the conviction quashed:

Held, a count in trespass; and that the plaintiff was properly non-suited, the cause of action being the seizure of the plaintiff's goods under three warrants, given upon conviction of the plaintiff, for alleged offences under the Act relating to the sale of spirituous liquors, two only of which had been quashed, and a conviction for assault; and therefore an act done by defendants in the execution of their duty, as justices, with respect to matters within their jurisdiction.

Quære, if the plaintiff had been entitled to succeed in trespass, whether he could have recovered the costs of quashing the convictions as damages.

H. Cameron, Q.C., for plaintiff.

Armour, Q.C., for defendants.

BELTZ v. MOLSON'S BANK.

Cheque—Alterations in date—Payment by Bank—Negligence.

The plaintiff, a merchant and customer of defendants' bank, having a note payable there on the 28th January, 1873, made a cheque payable to himself or bearer, and left it with defendants to meet the note. The cheque however was not used for that purpose nor returned to the plaintiff, but the note was paid by defendants charging it to the plaintiff's account. The cheque was afterwards, on the 31st January, 1874, presented to the defendants by some one unknown, the year having been changed from 1873 to 1874, and it was paid by defendants without noticing the alteration, and charged to the plaintiff's account. How it got out of defendants' bank was not ascertained.

Held, that the alteration avoided the cheque that defendants therefore were not warranted in paying it; and that the plaintiff was entitled to recover back the money.

Quære, whether if the check had not been void, the defendants on the ground of negligence, would in the facts more fully stated in the case, have been liable to the plaintiff for paying it.

Per WILSON, J., the cheque must be considered to have been paid when the note for which it was given, was handed over by defendants to plaintiff, and on that ground defendants could not have been made liable upon it.

Robinson, Q.C., and *Rock*, Q.C., for plaintiff.

Magee for defendants.

MECHANICS' BUILDING AND SAVINGS SOCIETY v. GORE DISTRICT MUTUAL FIRE INSURANCE CO.

Mutual insurance policy—Assignment to mortgagee—Subsequent insurance by mortgagor—Effects of on rights of mortgagee—Pleading.

A mortgagee, becoming assignee of a policy under the Mutual Insurance Act 36 Vict. cap. 44, O., by an assignment duly ratified by the company, becomes—whether he has given his own note, or the directors had assented to retain the premium note of the mortgagor—a person insured to the extent of his own interest, and is, in the event of loss, entitled to recover in his own name to the extent of his claim. By such assignment he acquires a separate independent interest under the policy, and he is not bound by a contract for further insurance made by the mortgagor without his knowledge, and which he could not prevent, nor by any acts of a similar kind beyond his control.

Held, that although the assignment might by agreement so bind him, the terms of the assignment here were not sufficiently clear to have that effect.

The declaration alleged that defendants by their policy insured one B. for $3,000 on a manufactory and stock: that afterwards with defendants' knowledge and consent, he assigned all his interest in the policy to the plaintiffs, as collateral security for a mortgage by B. to them for $3000, or the property insured: that defendants ratified and confirmed said policy to and in favor of the plaintiffs: that the premises were burned: and that by force of the statute the plaintiffs became under the said assignment interested in the said policy as the insured, and entitled to all rights as if they had been the original parties insured.

Defendants pleaded that the assignment was accepted by plaintiffs, and the consent given by defendants, subject to the condition that the plaintiffs should be bound by all the terms and conditions of the policy, as B. was bound by the same, and that the policy should continue voidable as though such assignment had not been executed, and that said policy was not otherwise ratified or confirmed to the plaintiff: that it was a condition of the policy that any insurance on the premises by the act or with the knowledge of the insured in any other company, without the consent of defendants, should avoid the policy; and though B. effected other insurances specified with defendants' consent.

The plaintiffs replied, that the said assignment was not accepted by the plaintiff, nor was defendants' consent thereto and the ratification by them to the plaintiffs, as in the declaration and plea mentioned, on the terms or subject to the condition that the plaintiffs should be bound by any terms which would render the policy voidable by any act or omission of B.; but by virtue of said assignment, consent and ratification, the plaintiffs became entitled to all the rights and subject to all the conditions to which B. had been subject, before the assignment, &c., but not otherwise; and that the said insurances effected by B. were without the plaintiffs' consent or knowledge; 3. that the alleged insurances effected by B. were not of the same interest as that insured by the plaintiffs under said policy in the declaration mentioned, and said insurances were not effected by plaintiffs or with their knowledge or consent.

Held, that the second replication was bad, as being in effect a demurrer to the plea, and neither traversing nor confessing and avoiding it; and that the plea was bad and the third replication good.

D. McCarthy, Q.C., and *B. B. Osler*, Q.C., for plaintiffs.

F. Osler and *Durand* for defendants.

[Feb. 6.

JOHNSTONE v. WHITE.

Husband and wife—Separate estate—C. S. U. C. cap. 73, 35 Vict. cap. 16—Ejectment—Outstanding term.

The plaintiff was married to her present husband in 1859, without any marriage settlement, and he before that year had reduced into possession the land in question.

Held, that she was not entitled to sue for it without joining her husband in ejectment. Either under C. S. U. C. cap. 73, or 35 Vict. cap. 16, O., such land not being her separate property, and the husband's interest not being divested by the last mentioned Act, and that she would not have been entitled even if her husband had not reduced it into possession.

The patent issued in 1836 to C., who apparently had made some agreement for sale to D.; who transferred it to the plaintiff. The plaintiff in 1846 conveyed the land to her sons, and in 1862 a deed for a nominal condition, was executed by C. to the plaintiff. The learned Judge, who tried the case without a jury, having found that this last deed was made to the plaintiff as a trustee to enable the title of her sons to be perfected: *Held*, that on this ground also the land could not be her separate estate.

The evidence shews that the plaintiff's son had for some time been in possession as a tenant under lease, at a year's rent. *Semble*, per HAR-

RISON, J., that this also would have been a bar to plaintiff's action.

Bethune, Q.C., for plaintiff.

Beaty, Q.C., for defendant.

In Re Johnson and the Corporation of Lambton.

Temperance Act of 1864—Voting for By-law—Poll closed too soon.

Where a by-law under the Temperance Act of 1864 had been carried in a county by 193 majority, but it appeared that in one township where the names of the qualified municipal electors on the assessment roll were more than 800, the poll was left open only two days, leaving 250 votes unpolled there, the by-law was set aside.

The names of owners appearing in the sixth column of the roll, under the heading "Owners and address," should be counted, in order to ascertain the number of electors, although not appearing in the second column headed, "Name of occupier or other taxable party," and not bracketed or numbered in the first column.

C. Robinson, Q.C., for applicant.

Bethune, Q.C., for county.

Stoness v. Lake and Walker.

Conviction—Insufficiency of information—Waiver of—Variance between conviction and warrant—C. S. U. C. cap. 126, sec. 17.

The plaintiff, on an information against him under 37 Vict. cap. 32, O., for selling liquor without a license, was brought before the defendants, magistrates. It was proved that this was his second offence, though the information did not charge it as such. The plaintiff disputed the evidence as to the first conviction, but did not object to the information, and the magistrates convicted and adjudged him to be imprisoned for ten days, which they had power to do only for a second offence. *Held*, that the plaintiff had waived the objection to the information, and that defendants were not liable in trespass.

Held, also, that the variance between the conviction and warrant, the former saying nothing as to hard labor and the latter providing for it, could not deprive the defendants of protection under the statute Con. Stat. U. C. cap. 126.

Held, also, that in any event defendants could not have been liable for plaintiff's suffering caused by the harsh regulations of the prison during his confinement; and that having been proved to have been guilty of the offence for which he was convicted, he could have only recovered three cents and no costs, under Con. Stat. U. C. cap. 126, sec. 17.

Bethune, Q.C., for plaintiff.

Britton, Q.C., for defendants.

Brown v. Great Western Railway Co.

R. W. Co.—Two lines crossing—Collision—Use of brakes—Negligence.

The defendants' railway crossed the Grand Trunk Railway on a level—the train on the defendants' line was approaching the crossing, and the air brakes for some reason did not act. It was too late after discovering this to stop the train with the hand brakes, or by reversing the engine, though every effort was made, and a collision occurred with a train on the other line, of which the plaintiff was a conductor, by which he was seriously injured. It was shewn that these brakes were in common use on railways, and that the brakes in question had been twice examined and frequently used on that day, and found all right and effective. The learned Judge, who tried the case without a jury, held that defendants were liable, for that the air brakes should have been applied at a sufficient distance to enable the train to be stopped by other means in case of these brakes giving way.

Per Harrison, C.J.—The finding was right.

Per Morrison, J.—There was no evidence of negligence, for the defendants were not bound to have any other than the air brakes, and were justified in depending upon them. Wilson, J., being absent, and the court thus equally divided, Morrison, J., withdrew his judgment, so as to avoid the expense of a re-argument, and enable the defendants to appeal.

Rock, Q.C., for plaintiff.

Barker for defendants.

[March 16.

Stewart v. Cowan et al.

Division Court bailiff—Interpleader issue—Detentio of goods after judgment for plaintiff—Notice of action—Liability of attorney.

Defendant C., a Division Court bailiff, was employed by the plaintiff to sell certain goods under a chattel mortgage given to the plaintiff by one L., advertised and took possession of them, and afterwards executions came into his hands against L., under which the attorney for the execution creditors told him to seize these goods. The plaintiff claimed them, and obtained judgment in his favour upon an interpleader issue. Defendant C. refused on demand

to give up the goods to the plaintiff until he should consult the attorney, who told him to use his own judgment. The plaintiff having brought trespass and trover.

Held, that C. was liable: that he was not entitled to a demand of perusal and copy of the warrants under which treated, for the action was not brought by reason of any defect in the process: that the jury were warranted in finding as they did, that he did not believe that he was discharging his duty as bailiff in refusing to give up the goods after the decision of the interpleader, which entitled him to notice of action: that the execution creditors were also liable; but that the attorney was not, for he had told C. he ought to use his own judgment.

Ferguson, Q.C., for plaintiff.

D. B. Read, Q.C., and *Osler* for defendant.

Stephens v. Stapleton.

Division Court bailiff—Notice of action—Sale of business—Evidence of bona fides.

The Consol. Stat. U. C. cap. 126, sec. 10, requiring notice of action, does not apply to the case of a Division Court bailiff acting under an execution, which is specially provided for by cap. 19, sec. 194; and a notice, therefore, to such bailiff, not having endorsed upon it the name and place of abode of the plaintiff, as required by the former, but not by the latter Act, was held sufficient.

Upon the evidence set out in the case, the jury having found that the business carried on by the execution debtor was that of his brother, and carried on by the execution debtor as his agent, a new trial was granted, with costs to abide the event.

J. K. Kerr, Q.C., for plaintiff.

Armour, Q.C., for defendant.

Re Johnson and Montreal and Ottawa Junction Railway Co.

Award—Motion to set aside—Practice.

A rule to set aside an award must be drawn up on reading the award or a copy of it.

The objections taken to the award were that having been made *ex parte* and without hearing witnesses it was void, and it was urged that it might therefore be set aside without producing it; but, *Held* otherwise.

Re Hinton v. *Meade*, 24 L. J. Ex. 140, not followed.

M. C. Cameron, Q.C., and *Beaty*, Q.C., for plaintiff.

Armour, Q.C., and *Kerr*, Q.C., contra.

DIGEST.

DIGEST OF THE ENGLISH LAW REPORTS

FOR NOVEMBER AND DECEMBER 1876, AND JANUARY 1877.

(*From the American Law Review.*)

Acceleration.—*See* Remainder.

Accommodation Bill.—*See* Bills and Notes, 3, 4.

Accumulation.—*See* Devise 2.

Act of God.

The defendant owned land upon which had been built embankments for the purpose of damming up a natural stream which ran through the land, thereby forming large pools. A storm occurred, accompanied with rain, heavier than ever known to have taken place there previously; and in consequence the stream was so swelled that it carried away the plaintiff's bridges. The jury found that there was no negligence in the construction or maintenance of the embankments, and that the storm was of such violence as to constitute the cause of the accident *vis major*. *Held*, that the defendant was not liable for the damage.—*Nichols* v. *Marsland*, 2 Ex. D. 1; s. c. L. R. 10 Ex. 255; 10 Am. Law Rev. 286.

Ademption.—*See* Settlement, 3.

Advowson.—*See* Trust, 1.

Ancient Lights.—*See* Prescription.

Annuity.

1. A testator bequeathed his residuary estate to trustees in trust to purchase thereout from government an annuity for M. for life; and he directed that M. should not be entitled to elect to receive the price or value of said annuity in lieu of it, and he declared that the annuity was given for the sole and separate benefit and disposal of M., and that if M. should at any time sell, alien, assign, transfer, incumber, or in any way dispose of or anticipate the annuity, it should thereupon cease, be void, and sink into the residue of the testator's estate. *Held*, that M. was not entitled to such sum as would purchase said annuity; but that said trustees should purchase an annuity for M. to be paid to her for life or until she should alien it.—*Hatton* v. *May*, 3 Ch. D. 148.

2. A testator gave an annuity to E. for life, and after her death to her children during their lives, and after the decease of the survivor to the testator's nephew and two nieces, equally between them. E. died without having had children. *Held*, that the gift to the nephew and nieces was not void for remoteness; and that the nephew and nieces were absolutely entitled to a principal sum which would produce said annuity.—*Evans* v. *Walker*, 3 Ch. D. 211.

3. A testatrix bequeathed stock to trustees to be laid out in an annuity for H. for life, and she directed that H. should not be entitled to have the value of his annuity in lieu thereof, and that if he should sell, mortgage, pledge, or anticipate his annuity, the same should cease and form part of the testatrix's residuary estate. *Held*, that H. was absolutely entitled to the annuity and could sell it.—*Hunt-Foulston* v. *Furber*, 3 Ch. D. 285.

See Priority, 2.

Digest of the English Law Reports.

Appointment.

1. By marriage settlement, personal property was assigned to trustees upon trust to pay the income to the wife to her separate use for life; and after her decease, in case the husband should survive, to pay him so much of the income as the wife should by deed or will appoint for his life; and subject thereto the trustees to hold the property for children of the marriage; and in case there should be no children (which event happened) to trustees to hold the property in trust, in case the wife should survive the husband, for the wife, her executors, administrators, and assigns, absolutely, for her sole and separate use. The wife executed a will during her husband's lifetime, in which she exercised her power of appointment; and she survived her husband without having had children. *Held*, that the will was a valid exercise of her power of appointment. Under the settlement the wife had the whole estate in the property to her separate use, and could therefore dispose of the property by her will: and her will made during coverture did not require re-execution after the husband's death.—*Bishop* v. *Wall*, 3 Ch. D. 194

2. Under a marriage settlement, E. had a power of appointment among his children over certain funds in the hands of trustees. The trustees lent said funds, amounting to £6,000, to E., upon mortgage of E.'s farm. Many years later, E. in order to dispose of his property in favor of his two sons, executed three deeds of even date. By the first, to which both his sons were parties, E. settled said farm on his elder son for life, remainder to such son's children as he should appoint, and in default of appointment to all such son's children as tenants in common, remainder in default of such children to E. and his heirs. By the second deed, E. appointed said £6,000 to his eldest son absolutely; and E. and said son and the trustees released said farm, freed from the mortgage, to a trustee to the uses of said first deed. By the third deed, E. gave the residue of his property to his second son. By his will, bearing the same date, E. confirmed said deeds; and referring to the contingency upon which, under said first deed, said farm was limited to himself and his heirs, he declared that upon the happening of such contingency said farm should be charged with £3,000 in favor of his daughter, and subject thereto should belong to his second son. E. died, and his daughter filed a bill against her two brothers, alleging that E.'s appointment was made, not for the benefit of his elder son, but with the object of relieving his farm from the payment of said £6,000, and was therefore fraudulent and void; and that she was entitled to one-third of said £6,000. *Held*, that it did not appear that E. had made said deeds with corrupt or improper intention; that his disposition of said £6,000 under his power was not so improper as to be void if there were no fraudulent intent; and that although E., if he had not become a party to said deed, might have claimed the benefit of the appointment in his favor, free from the condition that he should release said farm from said charge, yet having signed the deeds he was bound by the condition.—*Rooch* v. *Trood*, 3 Ch. D. 429.

3. M. had the power of appointment over a fund among her children, and in default of appointment the fund was to go to her children in equal shares. M. appointed that trustees should stand possessed of the whole of said fund in trust to pay the income of £1,200, part of the fund, to M.'s son J. for life, and after his death in trust for all the children of J. equally. And in case J. should die without children, then said £1,200 "to be added to and form part of the residue" of her trust estate. The residue of said fund M. appointed upon certain trusts for her daughters. J. died, leaving children. It was admitted that the appointment to J.'s children was beyond M.'s power and void. *Held*, that upon J.'s death said £1,200 fell into the residue of M.'s estate, and was included in the appointment in trust for M.'s daughters.—*In re Meredith's Trusts*, 3 Ch. D. 757.

4. Legacy to V., the testatrix's daughter for life, and after her death "to and amongst my other children or their issue in such parts, shares, and proportions, manner and form, as V. shall by deed or will appoint." The testatrix left three children besides V. *Held*, that V. had the right to appoint in favor of one of the testatrix's other children, and that said power was exclusive.—*In re Veale's Trusts*, 4 Ch. D. 61.

See Settlement, 1, 7.

Appropriation of Payments.—*See* Bills and Notes, 1; Estoppel, 1.

Attorney's Lien.—*See* Lien, 1.

Bank.—*See* Bills and Notes, 5; Partnership.

Bankruptcy.—*See* Hotel-Keeper; Partnership; Settlement, 6.

Bequest.—*See* Annuity, 1, 2; Appointment, 3; Charity; Contingent Remainder; Divorce; Election; Illegitimate Children; Legacy; Partnership; Priority, 2; Remainder; Settlement, 3; Trust, 3; Will.

Bills and Notes.

1. E. in London ordered cotton of A. in Bombay, and A. accordingly sent the cotton with bill of lading to his correspondent in London, together with a bill of exchange drawn on E. containing the direction that the amount of the bill should be placed to "account cotton shipments as advised" E. accepted the bill, received the bill of lading, and raised money upon it from C., who subsequently sold the cotton. E. failed. A. claimed the proceeds of the cotton as having been specifically appropriated to the payment of the bill of exchange. *Held*, that there was no such specific appropriation. *In re Entwistle. Ex parte Arbuthnot*, 3 Ch. D. 477.

2. By agreement between brewers and an ale merchant, the latter was to be allowed 20 per cent discount on the invoice price of ale sold to him on payment in cash within one month. The merchant, on purchasing ale of the brewers, gave them certain bills of exchange drawn by the brewers upon the merchant and accepted by him. The bills were not paid at maturity. *Held*, that the bills were not payment, as they were dishonored at maturity, and that the merchant was not entitled to said discount.—*In re Cumberland. Ex parte Worthington*, 3 Ch. D. 803.

3. Action on a bill of exchange by an indorsee against an indorser. Defence, want of notice of dishonor. Reply, that neither drawer, acceptor, nor any indorser prior to the defendant had at any time any effects of the defendant in his hands; and that the bill was drawn, accepted, and indorsed by the defendant and prior indorsers, for the purpose of raising money for the defendant, the drawer, and the acceptor, and the persons who indorsed before the defendant, jointly; and the defendant was in no way dam-

nified, even if there was no notice of dishonor. Demurrer sustained.—*Foster* v. *Parker*, 2 C. P. D. 18.

4. In an action against an indorser of a bill of exchange, the indorser set forth in his defence that the bill was an accommodation bill, drawn, accepted, and indorsed to enable another indorser to raise money upon it, and that such other indorser had promised to meet the bill, but had failed to do so, and that the said indorser, the defendant, had never received notice of the dishonor of the bill. *Held*, that the defendant was entitled to notice of dishonor of said bill.—*Turner* v. *Samson*, 2 Q. B. D. 23.

5. M. bought on Feb. 11 from L. drafts by L. upon a Cadiz merchant. By custom of the London money market such bills are paid for upon the first postday after their purchase, which in this case was Feb. 14. On Feb. 12, L. was pressed by his bankers to reduce the debt he owed them, and accordingly on Feb. 14 gave them an order requesting M. to pay them the amount of said drafts. On Feb. 14, M. gave said bankers his check for the amount of said drafts, and the bankers delivered to M. the said order of L. on M. On the same day, L. failed, whereupon M. stopped payment of the check he had given to said bankers. *Held*, that the bankers were entitled to recover from M. the amount of his check.—*Misa* v. *Currie*, 1 App. Cas. 554.

BROKER.—*See* INSURANCE, 2.

CALLS.—*See* WILL, 2.

CARRIER.—*See* ESTOPPEL.

CHARITY.

A testator directed that certain funds, over which he had power of appointment, should, unless otherwise specifically disposed of by a codicil to his will, become part of his residuary estate. By a codicil, the testator gave legacies out of said funds to certain societies, and the residue he directed to be given to such charitable institutions as he should by any future codicil direct, and, in default thereof, to be distributed by his executors at their discretion. The testator made no further codicil. *Held*, that the gift of the residue was to be distributed among charitable institutions as the executors should direct. —*Pocock* v. *Attorney-General*, 3 Ch. D. 342.

CHARGE.—*See* PRIORITY, 2.

CHECK.—*See* BILLS AND NOTES, 5.

CHILDREN VENTRE SA MERE.—*See* LEGACY, 1.

CLASS.—*See* LEGACY, 1, 8; PERPETUITY.

CODICIL.—*See* WILL, 1.

COLONIES, ENGLISH.—*See* LIMITATIONS, STATUTE OF.

COMMON CARRIER.—*See* CARRIER.

COMPANY.

A Single shareholder cannot constitute a "meeting" of a company under 32 and 33 Vict. c. 19, § 4.—*Sharp* v. *Dawes*, 2 Q. B. D. 26.

See JUDGMENT; WILL, 2.

CONDITION.—*See* ANNUITY. 1; APPOINTMENT, 2; VENDOR AND PURCHASER, 1.

CONFIRMATION.—*See* SETTLEMENT, 1.

CONSTRUCTION.—*See* ANNUITY; APPOINTMENT; CHARITY; CONTINGENT REMAINDER; DEVISE; ILLEGITIMATE CHILDREN; INSURANCE, 2, 3; LEGACY; MORTGAGE, 1; PERPETUITY, REMAINDER; SETTLEMENT, 4, 5; STATUTE; TRUST; WILL, 2.

CONTINGENT REMAINDER.

A testator devised one moiety of his real estate to two trustees and their heirs, "to the several uses and upon the several trusts, and for several ends, intents, and purposes thereinafter declared," for the term of one hundred and twenty years next after his decease, if S. should so long live, and after the expiration of said term, and in the meantime subject thereto to the use of J., the husband of S., for life, with remainder to the use of said trustees during the life of J., to preserve contingent remainders, remainder to the use of all the children of S. living at her decease, as J. and S. should appoint, and in default of appointment to the use of all the children of S. living at the decease of the survivor of J. and S., and the issue of such of them as should be then dead, leaving issue then living, such issue to take their parent's share as tenants in common, with divers remainders over. The trustees were authorized to "convey in exchange" the devised property, and to convey "in fee-simple upon partition" any of the testator's undivided shares in property, and for such purposes to revoke the aforesaid trusts and to grant and convey the premises whereof the uses should be revoked to such person and to such uses as should be necessary, or to declare such uses, estates, or trusts of the premises as should be necessary. The other moiety was devised upon like trusts for other parties. J. died, leaving his wife S. surviving; and two years later S. died, leaving children. *Held*, that there was no legal estate in the trustees to support the contingent remainder in the children of S. during the period between the death of J. and the death of S.—*Cudliffe* v. *Brancker*, 3 Ch. D. 393.

See REMAINDER, 2; SETTLEMENT, 5.

CONTRACT.—*See* BILLS AND NOTES, 2; FRAUDS, STATUTE OF; INSURANCE; PRINCIPAL AND SURETY.

COVENANT.

The vendee of a piece of land adjoining other land of the vendor, covenanted to erect a pump and reservoir, and supply water from a well on the vendee's land to houses on the vendor's land. *Held*, that a purchaser of said land from said vendee, with notice of said covenant, was bound by it; and that the court would enforce the performance of the covenant indirectly by making such an order that the purchaser of said land would be guilty of contempt if he did not supply water according to said covenant.—*Cooke* v. *Chilcott*, 3 Ch. D. 694.

See MORTGAGE, 1; SETTLEMENT, 5.

CUMULATIVE LEGACY.—*See* WILL, 1.

CUSTOM.—*See* INSURANCE, 2; NEGOTIABLE INSTRUMENT.

CY-PRES.—*See* CHARITY.

DAMAGES.—*See* RELEASE OF DAMAGES.

DEBENTURE.—*See* JUDGMENT; PRIORITY, 1.

DEED.—*See* RELEASE OF DAMAGES.

DEVISE.

1. A testator devised "my property which is not under settlement as follows;" and after specific pecuniary legacies gave "the rest and residue of my unsettled property" to A. The

testator held certain copyholds as trustee. *Held*, that the copyholds passed under the devisee.—*In re Brown and Sibly's Contract*, 3 Ch. D. 156.

2. A testator gave his real and personal estate to trustees upon trust to accumulate rents for twenty-one years, and, at the expiration thereof, in trust for the second and every other younger son successively of W. in tail male, and, failing such issue, in trust for the first and every other son of H., in tail male; limitations over. At the expiration of said term, H. and W. were both living, and each had one son only. *Held*, that until it should be ascertained whether W. would have a second son, the rents of the real estate went to the heir-at-law, and the income of the personal estate went to the next of kin.—*Wade-Gerry* v. *Handley*, 3 Ch. D. 374.

3. Devise to E. and her heirs; but, if E. should die without leaving issue living at her death, then upon E.'s death to "the nine children of A., to be equally divided among them." The residuary estate was devised to P. E. died without leaving issue; and only one of said nine children survived E. *Held*, that the surviving child of A. took a tenancy for life only, subject to which the estate passed to E. and her heirs.—*Gatenby* v. *Morgan*, 1 Q. B. D. 685.

See Annuity, 1, 2; Appointment, 3; Charity; Contingent Remainder; Election; Illegitimate Children; Legacy; Perpetuity; Priority, 2; Remainder; Settlement, 1, 3; Trust, 3; Will.

Discovery.

Ship-owners who had shipped goods bearing counterfeits of the plaintiff's trade-mark were ordered to discover the name of the consignor, in aid of proceedings to be taken against the consignor.—*Orr* v. *Diaper*, 4 Ch. D. 92.

Domicile.

"A man having acquired a domicile of choice may abandon it, without it being incumbent on him to require a new domicile of choice; that is to say, he may abandon his domicile of choice without acquiring, in strictness, any new domicile; because his domicile of origin reverts.—Jessel, M. R., in *King* v. *Foxwell*, 3 Ch. D. 518.

Dower.—*See* Priority, 2.

Easement.—*See* Grant Prescription.

Election.

A testator who was entitled under a settlement to a life estate in certain cottages devised all his real estate to his wife for life, and after her death he devised said cottages to R. in fee. On the testator's death, his wife who survived him became absolutely entitled to said cottages under said settlement. R., in ignorance of said settlement, sold his supposed reversionary interest to the plaintiff. After the wife's death, the plaintiff first ascertained that the wife had sold the cottages to a purchaser without notice of said devise in the testator's will; and the plaintiff claimed compensation from his estate. *Held*, that the wife had elected to take said cottages against said will, and must make compensation to the plaintiff for the loss he had sustained by not getting possession of said cottages at the death of the widow, to the extent of the benefit she, the wife, received under said will.—*Rogers* v. *Jones*, 3 Ch. D. 688.

En Ventre sa Mere.—*See* Legacy, 1.

Equity.—*See* Discovery; Grant; Jurisdiction; Law, Mistake of; Release of Damages.

Estoppel.

1. W., who had intrusted £7,700 to P. for investment, was informed by P.'s clerk that P. proposed to lend the money upon security of leaseholds at Camden. P. subsequently wrote to W., stating that said sum had been put on mortgage as arranged by his clerk with W. P. died; and it was found that no mortgage existed in favor of W., but that leaseholds at Camden were mortgaged to P. to secure £100,000. *Held*, that P. and those claiming under him were estopped from denying that said £7,700 formed part of said £100,000, and that it must be paid to W. from the larger sum.—*Middleton* v. *Pollock*. *Ex parte Wetherall*, 4 Ch. D. 49.

2. A railway company carried certain pictures to a station where they were loaded in a van to be forwarded to their destination. There a man, falsely representing himself as in the employ of M. who carried for the company, obtained from the company's delivery clerk a pass enabling him to drive the van from the company's yard and steal the pictures. *Held*, that the company was not estopped from denying that the thief was their servant.—*Way* v. *Great Eastern Railway Co.*, 1 Q. B. D. 692.

Evidence.

1. The defendant was licensed by the plaintiff to make certain machines of which the plaintiff held the patent. The defendant made machines, but contended that they were not within said patent, on the ground that if the patent were constructed so as to cover the machines he had made, it would be void for want of novelty; and in proof of this he offered in evidence certain specifications of American patents which were to be found in the English Patent Office Library, but which were not known of by the plaintiff. *Held*, that the evidence was inadmissible.—*Adie* v. *Clark*, 3 Ch. D. 134.

2. In the private account-book of a deceased person, entries were found, in the writing of the deceased, of payment of interest from W., together with another entry to the effect that W. had on a certain day "acknowledged a loan to this date." *Held*, that these entries were admissible in evidence, although the effect might be to show that W. was indebted to the deceased.—*Taylor* v. *Witham*, 3 Ch. D. 605.

See Will, 1.

Exchange.—*See* Partition.

Executors and Administrators.

A creditor of a testator filed a bill stating that A. and B. were appointed executors by the testator, but that they had not proved the will; that they had taken possession of part of the personal estate and had paid therefrom certain legacies, but had not paid the testator's debts. The creditor further alleged that other defendants, C. and D., had obtained possession of part of the testator's personal estate, and threatened to dispose of it without paying the testator's debts; and he set forth his own debt and prayed for administration of the testator's personal estate, payment of his debts, and an injunction restraining all said defendants from parting with said estate in their hands. Demurrer, on the grounds that the executors had not yet proved the will, and that there could not be a suit for administration without a properly constituted legal representative before the Court; and that persons could not be sued for misappropriating a testator's assets without joining the legal representative and alleging fraud or collusion between them. Demurrer overruled.—*In re Lovett.*

Ambler v. *Lindsay*, 3 Ch. D. 198; s. c. L. R. 10 Ex. 76, 337.

See Law, Mistake of; Legacy, 9.

Executory Advice.—*See* Settlement, 1.

Fixtures.

A tenant became bankrupt and his trustee sold the tenant's fixtures in the leased premises to the plaintiff, who sold them to the defendant, the landlord, but no memorandum of the sale was signed by the defendant. *Held*, that the sale of the fixtures during the tenancy was neither the sale of an interest in land within § 4, nor a sale of goods and chattels within § 17, of the Statute of Frauds, 29 Car. 2, c. 3, § 4, 17.—*Lee* v. *Gaskell*, 1 Q. B. D. 700.

Foreign Government.—*See* Negotiable Instrument.

Frauds.—*See* Appointment, 2; Release of Damages; Settlement, 6.

Frauds, Statute of.

K. informed his daughter and her intended husband that he had bought a house which should in the event of the marriage be his wedding present to his daughter. After the marriage the daughter and her husband entered into possession of said house, a lease of which K. had bought subject to payment of certain instalments. K. paid all instalments which fell due in his lifetime, and died leaving a sum of £110 still to be paid, which fell due after his death. *Held*, that possession following K.'s promise took the promise out of the Statute of Frauds; and that K.'s agreement was to give a house free from incumbrances, and that therefore said £110 must be paid out of K.'s estate.—*Ungley* v. *Ungley*, 4 Ch. D. 73.

See Fixtures; Vendor and Purchaser, 2.

Freight.—*See* Mortgage, 2.

Grant.

A piece of land was conveyed to a grantee who covenanted to build a cotton-mill thereon; but the right was reserved to the grantor to work all mines and minerals under the land, making compensation for damage. The mill was built and the defendants who claimed under said grantor began to work the mines, thereby causing damage to the mill. The plaintiff prayed an injunction restraining the defendants from so working the mines as to cause injury to the plaintiff. Injunction refused. There was a remedy at law.—*Aspden* v. *Seddon*, 1 Ex. D. 496; s. c. L. R. 10 Ch. 394; 10 Am. Law Rev. 115.

See Prescription.

Guaranty.—*See* Principal and Surety, 2.

Hotel-Keeper.

A professional nurse kept a house for the reception of invalids, whom she supplied with provisions on which she made a profit, and she also superintended the nursing of the invalids. *Held*, that she was a "keeper of a hotel," and, therefore, a "trader" within the Bankruptcy Act, 1869.—*Ex parte Thorne. In re Jones*, 3 Ch. D. 457.

Illegitimate Children.

A testator made a bequest in trust for the child or children of his daughter M. the wife of J., as M. should appoint. M. was the sister of the deceased wife of J., and therefore their marriage was illegal. M. appointed in favor of two children born before the date of said testator's will, and also in favor of a child of which she was *enceinte* at said date, and of another child begotten and born after the testator's death. The House of Lords decided that the first two children could take under said bequest although they were illegitimate. *Held*, that the child *en ventre sa mère* could also take under said bequest and appointment, but not the child begotten after the testator's death.—*Crook* v. *Hill*, 3 Ch. D. 773; see 6 H. L. 265; L. R. 6 Ch. 311.

Income.—*See* Lease.

Injunction.—*See* Covenant; Grant.

Insurance.

1. M. insured his life in the B. association, which subsequently, without consultation with its policy-holders, amalgamated with the E. Society and ceased to carry on business. Two years afterwards the E. society by its directors indorsed a memorandum on M.'s policy, declaring that it should be liable for the payment of the amount insured by the policy, provided that the premiums were duly paid. *Held*, that there was a complete novation of said policy, and that M. had lost his claim against the B. association.—*In re European Assurance Society. Miller's Case*, 3 Ch. D. 391.

2. In an equity suit the plaintiffs, who had effected insurance on vessels belonging to the defendant, claimed the full amount as charged in their accounts of premiums paid by them with interest, without deducting from the amount so charged five per cent. brokerage allowed to them by the insurance offices on the premiums and ten per cent. discount for ready money also allowed by the insurance offices. Said allowances by insurance offices were usual; and the defendant had never inquired before said suit was begun the terms upon which the plaintiff had effected said insurance. *Held*, that the defendant could not object to the plaintiffs retaining said percentage, and charging him with the full amount of the premiums.—*Baring* v. *Stanton*, 3 Ch. D. 502.

3. Insurance was effected upon a steamship "lying in the Victoria Docks, with liberty to go into dry dock." The only dry dock into which the vessel could go was two miles up the Thames, and to go there it was necessary to remove the paddle-wheels. This was done in the Victoria Docks and the vessel was then towed to the dry dock. Repairs were made and the vessel towed down the river and moored, and while so moored the paddle-wheels were brought in a barge to be refitted, as was the custom of ship-owners in similar cases, because of the expense being less than if the wheels were refitted in docks. Before said wheels were refitted and while the vessel was lying in the river, the vessel was burned. *Held*, that the loss was not covered by the policy, as the vessel was moored in the river not in accordance with the ordinary mode of effecting the transit to or from the Victoria Docks, but for a collateral purpose.—*Pearson* v. *Commercial Union Assurance Co.*, 1 App. Cas. 498.

Interest.—*See* Judgment.

Judgment.

A railway company issued debentures for certain sums which with interest at six per cent. were charged upon the railway. A debenture holder brought an action upon an unpaid debenture and recovered judgment. The company was wound up and said debenture holder allowed to prove his judgment debt with four per cent. interest thereon. He claimed to prove an additional two per cent. interest on the judgment debt. *Held*, that the original debt was merged

in the judgment debt, which by statute only bore four per cent. interest.—*In re European Central Railway Co. Ex parte Oriental Financial Corporation*, 4 Ch. D. 33.

JURISDICTION.

The court of chancery has no jurisdiction to sell chattels settled in strict settlement, although the sale would be for the benefit of all parties interested.—*D'Eyncourt* v. *Gregory*, 3 Ch. D. 635.

LAPSE. - *See* LEGACY, 9.

LAW, MISTAKE OF.

An executor and a legatee severally took the advice of their counsel upon the construction of the will, and in accordance with the opinions they received the executor transferred and the legatee received a certain share of the bequeathed property. Two years later, said legatee filed a bill against the executor and another legatee, alleging that on the true construction of the will she was entitled to a larger sum than that which she had received, and praying repayment from the other legatee. *Held*, that the bill could not be maintained.—*Rogers* v. *Ingham*, 3 Ch. D. 351.

LAY DAYS.—*See* CHARTERPARTY, 1.

LEASE.

A testator gave to trustees a tithe rent-charge to which he was entitled on a twenty-one years' lease, which was renewed in practice every seven years on payment of a fine, upon trust to renew the lease out of the proceeds of the tithes, and divide the surplus equally during the life of his wife between her and the testator's grandchildren; and after his wife's decease said tithes were to form part of the testator's residuary estate. The trustees were given power to sell the rent-charge. The lease ceased to be renewable. The trustees accumulated a renewal fund from the income. *Held*, that the trustees must sell the leasehold interest and apply the income of its proceeds and of said renewal fund for the benefit of those entitled during the life of the testator's widow. *Maddy* v. *Hale*, 3 Ch. D. 327.

LEGACY.

1. Bequest "to each of the three children of my niece L. of one thousand pounds." At the date of the will L. had three children living and a fourth *en ventre sa mère*. The testatrix died before the birth of the fourth child. *Held*, that the three children born at the date of the will only were entitled to legacies.—*In re Emery's Estate. Jones* v. *Emery*, 3 Ch. D. 300.

2. A testator bequeathed all his household furniture which should be in his capital messuage at his death to trustees in trust to permit the same to be enjoyed as heirlooms with said messuage. The testator, who was occupying shortly before his death a house not his own, moved his furniture to his said messuage with the intention of leaving it there; but the tenant of the messuage, which was then under lease, refused to permit the furniture to be placed in the house during his tenancy, and it was accordingly stored in farm buildings belonging to the testator. *Held*, that said furniture in the farm buildings passed under said bequest.—*Rawlinson* v. *Rawlinson*, 3 Ch. D. 302.

3. Bequest of "all my personal property, all sums of money which I may possess, or may be owing to me at the time of my decease, together with all the furniture, farming implements, stock, and crop, belonging" to the testator's estate. *Held*, that the legacy was not specific.—*Fairer* v. *Park*, 3 Ch. D. 309.

4. A testator held £1500 upon trust to pay the interest of £1000 to his sister E. for life, and after her death in trust for her children, with a similar trust as to the remaining £500 for his sister A. By his will the testator directed that £1000 should be paid to his sister E. and £500 to his sister A. *Held*, that the bequests to E. and A. were not to be taken in satisfaction of the sums held by the testator in trust for said legatees.—*Fairer* v. *Park*, 3 Ch. D. 309.

5. A testatrix directed her debts and funeral and testamentary expenses and the legacies thereby bequeathed, to be paid by her executors; and after bequeathing certain pecuniary legacies and specific articles, she made a specific devise, and then gave her residuary real and personal estate to A. and B. upon certain trusts, and appointed A. and C. her executors. *Held*, that the residuary real estate was charged with the legacies, although the executors, who were not the trustees of the will, were directed to pay such legacies.—*In re Brooke. Brooke* v. *Rooke*, 3 Ch. D. 630.

6. A testator gave his real and personal property to his wife for life, and directed the principal to be equally divided after his wife's death "amongst all my family that shall be then living, when they shall attain the age of twenty-one years." At the date of the will, the testator's wife and seven children were living, some twenty-one, some under that age, and one married and having children. At the death of the wife, three children were surviving; two had died unmarried; one had died leaving a widow; and one had died leaving a widow and children. *Held*, that the testator's children could alone take under the words "my family."—*Pigg* v. *Clarke*, 3 Ch. D. 672.

7. A testator directed that his debts and funeral expenses should be paid by his executors "from money or promissory notes, or bills due at the time of my decease at the bank and elsewhere, the remainder to be equally divided to my surviving children." There were previous gifts in the will of various portions of the testator's property. *Held*, that the above gift of the remainder only included the remainder of said money notes and bills, and was not a general residuary gift.—*Jull* v. *Jacobs*, 3 Ch. D. 703.

8. A testatrix bequeathed to each of the three children of "Mrs. W., widow of the late W.," £100. At the date of the will the said Mrs. W. had been married for fifteen years to a second husband, to the testatrix's knowledge, and had had by him six children. By her first husband she had had five children of whom two were living at the date of said will. *Held*, that said two children by the first husband were alone entitled to the legacy.—*Newman* v. *Piercey*, 4 Ch. D. 41.

9. Legacy from B. to "the executors or executrix of C., the sum of £100." At the date of B.'s will C. was dead, and in his will had appointed an executor and two executrixes, all of whom predeceased B. It was contended that B. had made a gift to *personæ designatæ*, and that by their death the legacy lapsed. *Held*, that the legacy was given to the legal personal representatives of C and did not lapse.—*Trethewy* v. *Helyar*, 4 Ch. D. 53.

10. A bequest of "foreign bonds" by an Englishwoman, was held not to include bonds issued by the colony of New South Wales.—*Hull* v. *Hull*, 4 Ch. D. 97.

See ANNUITY, 1; APPOINTMENT, 3; CHARITY; CONTINGENT REMAINDER; DEVISE; ELECTION; ILLEGITIMATE CHILDREN; LAW, MIS-

TAKE OF; PERPETUITY; PRIORITY, 2; REMAINDER; SETTLEMENT, 3; TRUST, 3; WILL.

LICENSE.—*See* EVIDENCE, 1.

LIEN.

1. C., a solicitor, was instructed to prepare a mortgage, and the mortgagor deposited with him the title-deeds of the property for that purpose. C. also acted as solicitor of the mortgagees, and after the mortgage was completed, held the deeds on their behalf. The mortgagor became bankrupt, and his trustee directed C. to sell the equity of redemption, and it was accordingly sold and the money paid to C., who claimed a lien on the deeds as against the mortgagor for the amount of his costs due from the mortgagor. *Held*, that the solicitor was entitled to such lien and to retain his costs from said money in his hands.—*In re Messenger. Ex parte Calvert*, 3 Ch. D. 317.

2. S., who was a timber merchant, agreed to carry on business as the agent of a firm, but in his own name as before, and the firm agreed to remunerate S. for his services by a share in the profits in the business. No notice of this arrangement was given to outside creditors. Timber was forwarded by the firm to S. for sale, and dealt with by him as absolute owner. The firm drew bills on S., which were accepted by him on the firm's undertaking to protect such acceptances, according to a term of the agreement between S. and the firm. The firm and subsequently S. went into liquidation. S. claimed a lien on timber in his hands, which had been sent to him by the firm as above, to the extent of certain bills accepted by him as aforesaid and of a further sum due him from said firm as his share of profits in the business. *Held*, that S. was entitled such lien.—*In re Fawcus. Ex parte Buck*, 3 Ch. D. 795.

See PARTNERSHIP.

LIGHT AND AIR.—*See* PRESCRIPTION.

LIMITATION.—*See* ANNUITY, 1.

The English Statute of Limitations (3 & 4 Will. 4, c. 27) does not apply to the island of Jamaica, because the island is not referred to in the English statute.—*Pitt* v. *Lord Dacre*, 3 Ch. D. 295.

MARRIAGE.—*See* FRAUDS, STATUTE OF.

MARRIAGE SETTLEMENT.—*See* APPOINTMENT, 1.

MARRIED WOMEN.—*See* APPOINTMENT, 1.

MARSHALLING ASSETS.—*See* PRIORITY, 1.

MASTER AND SERVANT.—*See* ESTOPPEL, 2.

MINE.—*See* GRANT.

MORTGAGE.

1. A power of sale mortgage contained a proviso that, upon any sale purporting to be made, in pursuance of said power, the purchaser should not be bound to see as to whether there had been default in payment of principal or interest by the mortgagor, and that notwithstanding any impropriety or irregularity in said sale the same should, so far as regarded the safety and protection of the purchaser, be deemed to be within said power and to be valid and effectual accordingly; and that the mortgagor's remedy should be in damages only. The mortgagee conveyed the mortgaged property under said power to the defendant for valuable consideration. The plaintiff who was an incumbrancer of said mortgagor subsequent to said mortgagee, filed a bill to establish his priority over the defendant, alleging that if the accounts were examined it would appear that the prior mortgagee's debt was satisfied, and that the sale under said power was therefore invalid. *Held*, that said sale was valid, although the mortgage debt might have been paid.—*Dicker* v. *Angerstein*, 3 Ch. D. 600.

2. On Dec. 1, 1874, M., the owner of a vessel, mortgaged it to the plaintiffs for £7,500. On Jan. 4, 1875, the defendants, in ignorance of said mortgage, advanced M. £3,000 on security of a cargo shipped by M. on nominal freight of one shilling a ton. Feb. 2, 1875, M. again mortgaged said vessel to the plaintiffs for £4,000. February 19, M. and the defendants sold said cargo to J. on terms of freight being paid at fifty-five shillings a ton. On February 22, the defendants advanced £9,000 further to M. On February 26, M. assigned to the defendants said freight at fifty-five shillings per ton as security for their advances. On March 6, the plaintiffs registered their mortgage, and on the vessel's arrival took possession. The defendants acquired J.'s rights. *Held*, that the plaintiffs were entitled to said freight of fifty-five shillings per ton as against the defendants.—*Keith* v. *Burrows*, 1 C. P. D. 722.

See ESTOPPEL, 1; LIEN, 1; PRIORITY, 1; TRUST, 3.

NATURALIZATION.—*See* DOMICILE.

NEGLIGENCE.—*See* ACT OF GOD.

NEGOTIABLE INSTRUMENT.

The Russian Government issued scrip which upon its face undertook to give the bearer a bond for a certain sum when all instalments due on the scrip had been paid. By the custom of the English and Foreign Stock Exchanges, such scrip was treated as a negotiable instrument transferable by delivery. The plaintiff purchased some of said scrip and left it in the hands of C., who raised money upon it by pledging it as security with the defendants, and absconded. *Held*, that the defendants were as against the plaintiff entitled to said scrip and its proceeds.—*Goodwin* v. *Robarts*, 1 App. Cas. 476.

NOTICE OF DISHONOR.—*See* BILLS AND NOTES, 3, 4; PRIORITY, 3.

NOVATION.—*See* INSURANCE, 1.

PARTITION.

Trustees of one undivided moiety of an estate were authorized to make a partition; other trustees of the second moiety were authorized to sell, dispose of, convey, and assign, by way of sale for money or of exchange for an equivalent or recompense in lands. The two sets of trustees executed a partition deed. *Held*, that said partition was valid.—*In re Frith and Osborne*, 3 Ch. D. 618.

PARTNERSHIP.

Shares in a certain bank were subject to a lien in favor of the bank for all moneys due from the shareholder alone or jointly. Certain of such shares stood in the name of A., one of the firm, which became bankrupt owing money to the bank. The shares were originally the property of A., but after the formation of said partnership were entered upon books of the firm as its property. Of this the bank was ignorant, and it had no knowlekge that the firm claimed any interest in the shares until after the bankruptcy proceedings were begun; but the whole of said debt to the bank was contracted after said shares became partnership property. The bank contended that it was entitled to treat the shares

standing in A.'s name as his separate property. *Held*, that said shares were the joint property of the firm, and that the bank could only prove in the bankruptcy proceedings for the balance of their debt after giving credit for the value of the shares.—*In re Collie. Ex parte Manchester and County Bank*, 3 Ch. D. 481.

PATENT.

1. In a question of validity of a patent granted in England, it appeared that an American work containing a "claim," together with a short and imperfect description of the invention was sent to the Patent Office in London two years before the English patent was granted, and a book of illustrations containing a drawing of the invention five weeks before the English patent. *Held*, that the invention had not been so published as to deprive the English patent of novelty. Consideration of the sufficiency of a specification and description, and the requisite amount of novelty of a patent.—*Plimpton* v. *Malcolmson*, 3 Ch. D. 531.

2. If there is a patent for a combination, the combination itself is *ex necessitate*, the novelty; and the combination is also the merit, if it be a merit, which remains to be proved by evidence, By Lord Chancellor Cairns; and see the remarks of the Lords on new combinations, in *Harrison* v. *Anderston Foundry Co.*, 1 App. Cas. 574.

See EVIDENCE, 1; TRADE-MARK.

PAYMENT.—*See* BILLS AND NOTES, 2.

PERPETUITY.

A testator devised his real and personal estate to trustees upon trust to pay the income to his wife until her death or second marriage, remainder upon trust for all the testator's children living at such death or second marriage and the issue of any child then dead, such issue to take their parent's share in equal proportions; the shares of such of the testator's children or grandchildren as should be sons, to become vested in and payable to them when they respectively attained the age of twenty-four years, and the shares of the testator's daughters or the female issue of any deceased child to be settled upon certain trusts. *Held*, that all the gifts after the death or second marriage of the testator's wife were void for remoteness.—*Hale* v. *Hale*, 3 Ch. D. 643.

See ANNUITY, 2.

PLAN.—*See* VENDOR AND PURCHASER, 2.

PLEADING.

The plaintiff and defendant exchanged benefices under an agreement according to which no payment was to be made by either for dilapidations. The plaintiff sued the defendant for the cost of repairs which had to be made on the building of the benefice which he received from the defendant, and the defendant pleaded said agreement. The plaintiff replied that at the time of making said agreement and exchange the defendant stated to the plaintiff that the repairs of the buildings of his benefice were merely nominal or equal in amount to the repairs of the plaintiff's benefice, whereas in fact the defendant "knew or ought to have known" that the repairs of his benefice greatly exceeded in amount those of the plaintiff's benefice. *Held*, that the plaintiff's replication was bad as it did not allege that said inequality in the amount of the respective dilapidations was known to the defendant at the time of said agreement.—*Wright* v. *Davies* 1 C. P. D. 638.

POWER.—*See* APPOINTMENT; MORTGAGE, 1; PARTITION; SETTLEMENT, 1, 7.

PRESCRIPTION.

The plaintiff purchased houses more than twenty years old abutting at the rear upon a private way. Subsequently and by a different title he acquired other houses in the rear of the first houses, and abutting at their rear on said way. The plaintiff sold the latter houses to the defendants together with the land up to the back wall of the first houses, and including the land over which said way ran; and no easement was reserved to the plaintiff. The defendants pulled down their houses, and erected partly on their site and partly on the site of said way, a large building which obstructed the plaintiff's light. *Held*, that the defendants had a right to obstruct the plaintiff's light.—*Ellis* v. *Manchester Carriage Co.*, 2 C. P. D. 13.

PRINCIPAL AND AGENT.—*See* ESTOPPEL, 2.

PRINCIPAL AND SURETY.

1. D. contracted to purchase tar from a gas company and to pay within fourteen days from the monthly making up of accounts, unless the company should allow a longer time for payment. The defendant was a surety on the bond given by D. for the due performance of said contract. One of said accounts was made up on August third, and on the twenty-first of the month the secretary sent D. a note for the amount due and which had not been paid, with the request that D. would sign and return the note; which D. did. *Held*, that if taking the note was giving time by the company, such time was given after the fourteen days had expired and the liability of the surety had attached; and that he was therefore absolved from his agreement altogether. *Croydon Gas Co.* v. *Dickinson*, 1 C. P. D. 707.

2. N., who was a creditor of the plaintiffs, agreed among other things to transfer to them certain shares in a company, and redeem them before Jan. 1, 1874, and that his book debts should be collected, and one-half applied toward the redemption of the shares; and, whenever the par value of one or more of said shares was received by the plaintiffs, they were to deliver to N. the shares so redeemed. The defendant guaranteed N.'s performance of his part of said agreement. Subsequently, in consideration of certain of said shares and a sum in cash, the plaintiffs released their interest in said book-debts. *Held*, that the defendant's rights were so varied by the new agreement between N. and the plaintiffs, that the defendant was discharged.—*Polak* v. *Everett*, 1 Q. B. D. 669.

PRIORITY.

1. A testator bequeathed an annuity to his wife in lieu of dower, and gave other annuities to his children, and he gave certain other legacies. The testator gave right of distress and entry to said annuitants, and charged his real estate with all his bequests. The only real estate which the testator owned had been conveyed to him with declarations against dower, which was thereby barred by virtue of the 6th section of the Dower Act. *Held*, that the testator's widow was not entitled to priority in respect of her annuity; and that said annuitants were not entitled to priority over the other legatees.—*Roper* v. *Roper*, 3 Ch. D. 714.

(*To be continued.*)

CORRESPONDENCE.

Re Voters' Lists.

To the Editor of the Law Journal:

Sir,—The 4th Sec. of the Act of last session (1877) of Ontario Parliament, amending the Voters' Lists Act of 1876, will, I am afraid, somewhat puzzle some of the clerks whose duty it may be to act thereunder. It provides that the alphabetical list to be made by the clerk of every municipality, etc., shall hereafter be in three parts:

1. The first part is to contain the names of *all male* persons * * * appearing to be assessed for the real property or income requisite to entitle them to vote in the municipality at *both* municipal and parliamentary elections.

2. The second part is to contain the names of all *other* persons appearing * * * to be entitled to vote at municipal elections *only*.

3. The third part is to contain the names of all *other male* persons * * * appearing, etc., to be entitled to vote at parliamentary elections only, etc.

The qualification for electors for parliamentary elections is given in sub-sec. 1 of sec. 5 of 32 Vict. (O.) cap. 21, as follows: In cities, $400; in towns, $300; in villages, $200; in townships, $200. For municipal elections, in sec. 78 of 36 Vict. (O.) cap. 48, as follows: In cities, $400; in towns, $300; in villages, $200; in townships, $100.

In cities, towns and villages, therefore, the qualification for municipal and parliamentary electors seems to be identical. How then, in such places, can a clerk make up either a second or third part as directed by sub-secs. (b.) and (c.)? How can a list be made which shall contain the names of persons appearing by the assessment roll to be municipal electors *only*? or parliamentary electors *only*? and these are to be *other* persons besides those whose names are contained in the first part, which apparently must contain the names of *all* electors in the places mentioned.

Did the Legislature intend any special meaning by using the expressions, "all *male* persons" in sub-sec. (a.), "all *other* persons" in sub-sec. (b.), and "all *other male* persons" in sub-sec. (c.)? Why was the form of expression so varied? Should the second part of the list contain the names of *females*, such being expressly excluded from the other parts?

By giving the above matter your kind attention, and an expression of your opinion thereon through the Law Journal, you will, I am sure, confer a favour on many of your readers.

Yours truly,

E. M.

[We do not think the Legislature intended any special meaning by omitting the word "male" in sub-sec. (*b*). It was doubtless omitted by the draughtsman, and the omission was carelessly passed over by a Legislature remarkable for its careless legislation. The context shews that it can only refer to those entitled to vote, to wit: *males*.

As to the previous question asked, it is apparently intended that the first part of the list shall contain the names of all persons entitled to vote at *both* elections; the second part those not contained in the first part, but who are entitled to vote at municipal elections only, but are in some way disqualified for voting at parliamentary elections; and the third part is to contain those who in like manner are qualified to vote at parliamentary elections, but not at municipal elections. In townships, the second part will evidently contain a list of voters below $200, who are not entitled to vote at *both* elections.]

FLOTSAM AND JETSAM.

The throwing of an egg at Mr. Vice Chancellor Malins has been the subject of many pleasantries. It is said that after the egg was thrown, the usher of the Court was ordered to examine the debris; having done so, he said "It smells quite sweet, my lord." One of the Counsel present thereupon remarked, "The fellow must be mad, there is no precedent for pelting with sound eggs."

Now that St. Patrick's Day has come and gone, the case of *R.* v. *Slater* may be safely recalled. As reported in 6 C. & P. 334, "Mary Slater was indicted for cutting and wounding Johanna Moriarty. The prisoner was found guilty, but recommended to mercy on the ground that the parties were Irish, and on account of the excitement of the day, it being St. Patrick's Day." Verily, Mary Slater aforesaid must have found the four-leaved shamrock. Another fortunate law-breaker was John Kitelay, who, at the Huntingdonshire Assizes last week, was convicted of stealing some clover hay, value 14*s*. Sir Baliol Brett sentenced him to one month's imprisonment, but after the prisoner was removed from the dock, a juryman remarked, "That was rather stiff, my lord." "Do you think so, gentlemen?" said the judge. The jury, after consulting, said they did think so. "What sentence would you suggest, gentlemen?" asked his lordship. "Cut it in halves, my lord," said they. "Very well, gentlemen," said the pliant judge, "it was your verdict, and it shall be your sentence. Let the prisoner be brought back." Upon this being done, the judge said to him—"The jury think a month too stiff; take fourteen days." And that sentence was recorded. James Mulligan, however, has been luckier still. He was indicted at Galway Assizes, on Tuesday last, for assault and robbery, but the Crown counsel agreed not to proceed with the prosecution provided the prisoner enlisted if liberated. The recruiting-sergeant was in waiting at the dock door, and immediately on the prisoner making his appearance, formally swore him in, and thus invested with the rank of private he was discharged. "Thou must marry either a she-truand or the halter," was the alternative proposed to "Maitre Pierre Gringuoire," when in an evil hour he had penetrated the terrible *Cour des Miracles*. Bear the bayonet, or the sword of Justice shall perform its office, was the dilemma presented to poor James Mulligan. And so "Gringuoire" married a Gypsy, and Mulligan follows the drum.—*Irish Law Times.*

RULES OF COURT.

EXCHEQUER COURT OF CANADA.

GENERAL ORDER.

February, 28, 1877.

It is Ordered that the suppliant in any petition of right, and the plaintiff in any other case shall on the first day of the sittings of the Court for the trial of any cause to be tried out of the city of Ottawa, file with the acting Registrar of the said Court a copy of all the pleadings in the causes certified by the Registrar of the Court at Ottawa.

That at the time of delivering the said pleadings to the acting Registrar, the suppliant or plaintiff shall pay over to him the sum or fee of $6, and on each day at the opening of the Court a like sum of $6 for every day during which the said trial continues.

If the suppliant or plaintiff omits or refuses to pay in such sum, then the defendant may do so, and it shall be taxed or allowed him in the costs of the suit.

If both parties neglect or refuse to pay such sum, then the Judge trying the cause may order that the same be struck out of the list and not further proceeded with at the said sittings, making such order as to the costs incurred at the trial up to that time as he may think fit or he may in his discretion reserve the question of costs or make no order respecting the same.

The acting Registrar shall out of the said money be paid a fee of $6 per diem for each day actually engaged in Court.

If at the termination of the sittings or at any time thereafter, it is found that a sum has been paid to the acting Registrar on pursuance of this order in excess of that which may have been required to pay the fees of such acting Registrar and other charges payable thereout, then the Court or a Judge may order such excess to be refunded to the party who may have paid the same.

(Signed) WM. B. RICHARDS, C.J.
W. J. RITCHIE, J.
S. H. STRONG, J.
J. T. TASCHEREAU, J.
W. A. HENRY, J.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Hilary Term, 40th Victoria.

During this Term, the following gentlemen were called to the Bar; the names are given in the order of merit.

Albert Clements Killam.
Thomas Hodgkin.
Cornelius J. O'Neil.
Francis Beverley Robertson.
Henry Ernest Henderson.
Hamilton Cassels.
Francis Love.
William Wyld.
Thomas Caswell.

The following gentlemen were called to the Bar under the rules for special cases framed under 39 Victoria, Chap. 3.

George Edmikson.
Frederick W. Colquhoun.
Edward O'Connor.
John Bergin.

The following gentlemen received Certificates of Fitness:

J. H. Madden.
H. Cassels.
J. W. Gordon.
J. Dowdall.
C. J. O'Neil.
T. M. Carthew.
T. J. Decatur.
T. D. Cowper.
A. W. Kirkman.
C. McK. Morrison.
C. Gordon.
F. S. O'Connor.
G. S. Hallen.

And the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:

Graduates.

Charles Augustus Kingston.
John Henry Long.
James J. Craig.
William Fletcher.
Leonard Harstone.
Patrick Anderson Macdonald.

Junior Class.

Benjamin Franklin Justin.
John F. Quinlan.
John Williams.
Joseph William MacDowell.
Phillip Henry Dratton.
Thomas A. Gorman.
James R. Brown.
George J. Sherry.
Hector McKay.
D. Henderson.
Alexander Carpenter Brazeley.
John Bertram Humphries.
Lauren G. Drew.
Herman Joseph Eberts.
Solomon George McGill.
David Johnson Lynch.
Thomas Henry Luscombe.
John Vashon May.
George Moir.
J. H. Macallum.
Hugo Schlieper.
David Robertson.
Angus McB. McKay.
Charles Rankin Gould.
William James Cooper.
Edward Stewart Tisdale.
Francis Melville Wakefield.
Alexander Stewart.
Thomas Miller White.
John Arthur Mowat.
Henry Bogart Dean.
George Robert Knight.
Humphrey Albert L. White.
John Wood.
George Benjamin Douglas.
Alexander Humphrey Macadams
Hugh Boulton Morphy.
William Henry Brouse.
George J. Gibb.
Frederick E. Redick.
William Masson.
Edward Guss Porter.
Thomas Robert Foy.
Henry Albert Rowe.
Thomas H. Stinson.
Stewart Masson.
Francis Evans Curtis.
William Steers.
Robert Taylor.
Henry M. East.
Armour William Ford.

Wm. Martin McDermott.
Charles W. Phillips.
Wellington Smaill.
John Clyde Grant.
George Merrick Sinclair.
George Walker Marsh.
Edward Albert Foster.
Frank Russell Waddell.
Francis P. Conway.
Henry Dexter.
William T. Easton.
Albert Edward Wilkes.
James Lane.
John Henry Cooke.
Alexander Howden.
Douglas Buchanan.
John Alexander Stewart.
Arthur Mowat.
John McLean.
Robert Cockburn Hays.
William Aird Adair.
Ernest Wilbert Sexsmith.
John Baldwin Hand.
James Barrie.
George Frederick Jelfs.

Articled Clerks.

Noble A. Bartlett
Owen M. Jones.
Eugene Maurice Cole.
Ernest Arthur Hill Langtry.
John Oberlin Edwards.
J. A. Loughreed.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission as Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects:—

CLASSICS.

Xenophon Anabasis, B. I.; Homer, Iliad, B. I. Cicero, for the Manilian Law; Ovid, Fasti, B. I., vv. 1 300; Virgil, Æneid, B. II., vv. 1-317; Translations from English into Latin; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of quadratic equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; An examination upon "The Lady of the Lake," with special reference to Cantos v. and vi.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar. Translation of simple sentences into French prose. Corneille, Horace, Acts I. and II.

or GERMAN.

A paper on Grammar. Musæus, Stumme Liebe Schiller, Lied von der Glocke.

Candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), are required to pass a satisfactory examination in the following subjects:—

Ovid, Fasti, B. I., vv. 1-300,—or
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

A Student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk, (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

All examinations of Students-at-Law or Articled Clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

THOMAS HODGINS, *Chairman.*

Osgoode Hall, Trinity Term, 1876.

Adopted by the Benchers in Convocation August 29, 1876.

DIARY FOR JULY.

1. SUN..*5th Sunday after Trinity.* Dominion Day. Long vacation commences.
2. Mon ..County Court term begins. Heir and Devisee sittings begin.
6. Fri....Last day to serve notice of Appeal from Court Revision to County Judge.
7. Sat....County Court term ends. Col. Simcoe, Lieut.-Governor, 1792.
8. SUN..*6th Sunday after Trinity.*
14. Sat....Hon. W. P. Howland, Lieut.-Governor, Ontario, 1868.
15. SUN..*7th Sunday after Trinity.*
17. Tues..Heir and Devisee sittings end.
22. SUN..*8th Sunday after Trinity.*
23. Mon ..Union of Upper and Lower Canada, 1840.
24. Tues..Canada discovered by Cartier, 1534.
25. Wed..St. James. Battle of Lundy's Lane, 1813.
26. Thur..Jews first admitted to House of Commons,'58.
29. SUN..*9th Sunday after Trinity.*
30. Mon ..First English newspaper published, 1588.

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THE
Canada Law Journal.

Toronto, July, 1877.

The Supreme Court of Illinois has lately held that the rights of a mortgagee whose mortgage has been recorded in the books of registry is not affected by the fact that it had not been indexed, on the ground that the entry in the index is not a part of the process of record: *Mutual Life Ins. Co.* v. *Dake*, 4 Cent. L. J. 340.

In *Langmead* v. *Corkerton*, 25 W. R. 317, Sir George Jessel calls attention to a point that had been overlooked by several judges as to the authoritative weight to be given to decisions of the Lord Chancellor when sitting in the stead of other judges. In every such case he holds that the Chancellor takes the list of cases by virtue of his own original jurisdiction to try cases in the first instance, and his decision as Lord Chancellor is an authority binding upon every judge of first instance.

SURROGATE FEES IN CONTENTIOUS BUSINESS.

Until the other day, it was commonly supposed that there was no tariff fixed by the Committee of Judges appointed to regulate the practice and procedure of the Surrogate Courts. Upon that assumption, *Harris* v. *Harris*, 24 Gr. 459, was decided, as was also *Re Osler*, 7 Pr. R. 80. But, as was discovered upon an appeal from the judgment of the Master in this latter case, it happens that the commissioners passed some provisional orders in August, 1858, which, though promulgated and sanctioned by the Legislature as mentioned in the 18th sec. of the C.S. U.C. cap. 16, were not printed with the Surrogate Court rules.

One of these rules provides as follows: "The fees to be taken by attorneys and barristers respectively, practising in the Surrogate Court, in respect to business under the said Act, or under any Act of the Parliament of Upper Canada, or of this Province, giving power or jurisdiction to the said Courts or the Judges thereof, shall be the same as nearly as the nature of the case will allow as are now payable in suits and proceedings in the County Courts." Upon the appeal in *Re Osler*, the above rule was brought under the notice of Vice-Chancellor Proudfoot, who held that it was still in force and applicable to the case before him. His Lordship held that as the Judges had subsequently only drawn up rules applicable to non-contentious cases, and had not made provision for the costs in contentious cases, no full body of rules had been settled, and that this provisional regulation was still operative and determined the scale to be allowed in contentious matters as that of the County Court. Solicitors therefore will do well to delete the reports of the above judgments and make a reference to this recently discovered order, which gives a *quietus* to all elaborate disquisitions on the meaning of the meaning of the word "*Practice*" as used in the Surrogate Courts Act.

THE LAW OF DOWER.

(*Continued from page* 155.)

Since writing the former article on this subject the case of *Re Robertson* has been reported in 24 Gr. 442. The decision proceeds upon this, that where the widow has barred her dower in her husband's land, which is being mortgaged to secure the husband's debt, and that land is sold to realize the security after the death of the husband, then the widow is entitled as against creditors to dower out of any surplus proceeds of the land, computed on the whole value of the mortgaged lands. This, the most recent case in Ontario, is quite in accord with the last English decision on an analogous point by Bacon, V.C., the report of which in *Dawson* v. *Bank of Whitehaven*, L. R. 4 Ch. Div. 639, reached this country after *Re Robertson* was decided. On this head of dower, it may be taken that the authorities have settled the law conclusively.

Perhaps no part of the law of dower requires more elucidation and demands greater study than that which involves the doctrine of election. The foundation of the doctrine is that the widow shall not be allowed to claim under any testamentary instrument without giving full effect to it in every respect, so far as her rights are concerned. Where a benefit is given to her, expressly in lieu of dower by a will disposing of all testator's property, she must elect whether she will take that under the will and relinquish her dower, or retain her dower and abandon her rights under the will. But where a testator gave his wife an annuity "in lieu of all dower, etc.," and his personal estate was not disposed of, it was held that she was not precluded from participating in such personalty as one of the next of kin: *Taverner* v. *Grindley*, 32 L. T. N.S. 429. With this accords the judgment of Strong, V.C., in *Davidson* v. *Boomer*, 18 Gr. 479, where he says, "the widow as one of the persons to whom the Statute of Distributions gives the personal estate in the case of a failure of a gift of personalty, takes both the annuity and her statutory share, as the testator is only to be considered as purchasing the thirds for the benefit of his legatees. But in cases of realty, the testator is deemed to have purchased the dower for the benefit of whomsoever the estate may go to, whether it passes under the will, or part of it, through the invalidity of the will, devolves upon the heirs."

Where, however, the exclusion from dower is not expressly stated on the face of the will, the courts have held that such exclusion may arise constructively by clear and manifest implication. The result of the cases as stated by Lord Redesdale is that "the instrument must contain some provision inconsistent with a right to demand a third of the lands to be set out by metes and bounds:" *Birmingham* v. *Kirwan*, 2 Sch. & Lef. 452. It has been judicially determined that the effect of certain provisions in a will indicating the testator's intention as to the mode of occupation and enjoyment of the property are necessarily inconsistent with the claim of the widow to disintegrate the estate. Thus the existence of a power to lease in the will puts the widow to her election: *Patrick* v. *Shaver*, 21 Gr. 123, and *Armstrong* v. *Armstrong*, Ib. 351. The like result follows where the testator directs his estate to be equally divided between his wife and another: *McGregor* v. *McGregor*, 20 Gr. 451.

There is still a third class of cases where the Court has had regard to the circumstances of the testator to assist in the construction of the will,—where, for instance, at the date of the will the estate of the husband is insufficient to answer the wife's dower, and also an annuity given to her out of the land. In such cases, the Court will refer it to the Master to ascertain the estate and value of the testator's property at the time the will was made, and where it appears that the testamentary allowances made to her will more than exhaust the rents and profits of the real estate, if she also takes dower, the Court will put the widow to her election. This was done in *Becker* v. *Hammond*, 12 Gr. 485, and also in *Lapp* v. *Lapp*, 16 Gr. 159, and further reported in 19 Gr. 608.

There is a good deal of confusion in the authorities upon the question as to the proper effect to be attributed to a will in which the intention to devise unincumbered of dower is applicable only to certain parcels of the land. The earlier cases are in favour of the exemption not being extended by inference to other property embraced in the will, as in *Birmingham* v. *Kirwan*, already cited, but this appears to be considerable modified by more recent decisions which are referred to in *Stewart* v. *Hunter*, 2 Chan. Cham. R. 338. In *Hutchinson* v. *Sargent*, 16 Gr. 78, it was laid down that wherever a testator's intention as to one part of his property is shewn to be that it should not be subject to dower, it follows that neither that nor any other part of the devised property is subject to dower. This is perhaps stating the true rule rather broadly. It may be found that the cases are to be reconciled by holding that where different estates are devised to different beneficiaries, the intention to divest one of the widow's dower does not indicate an intention as to all; but that where there is one devise of the whole, an intention to exclude the claim for dower as to any part will operate as to the whole. But upon this matter, it would seem that the law remains to be settled.

We have but glanced at the many interesting and important practical questions which arise upon this subject, and we again hope it may not be long before we shall have a Canadian monograph on the law of dower.

CURIOSITIES AND LAW OF WILLS.

(*Continued from page 159.*)

The American Republic, after the Revolution, retained all the good things belonging to the mother country that they possibly could, and among others the English common law, which now forms the substantial foundation of the law in

every state except Louisiana. The English law, therefore, relating to the execution and probate of wills as administered in the Ecclesiastical Courts prior to the last quarter of the last century, (subject to certain statutory modifications suitable to the times and the men) governs similiar subjects throughout the Union; and the old country precedents, decisions and rules have authority and force in the special courts of the Republic having a like jurisdiction, be they Probate Courts, Orphans Courtsor Surrogate Courts.

According to Mr. Proffatt, man by nature has no right to interfere in the disposition of his property after he shuffles off this mortal coil; in the golden age what was left went all to his family, he who "heaped together a little pile" being deemed to be only a tenant for life. This, by the way, is well brought out in the Gentoo Code; here the old Sanscrit legislator in shewing who is to inherit proceeds with great ease through the most complex relations, and threads the degrees of affinity with as much dexterity as one of his nation's jugglers shews in keeping up half-a-dozen balls at once; he winds up by declaring that "if there be no grandfather's grandfather's father's brother's grandson, the property goes to the grandfather's grandfather's grandfather's daughter's son: if there be but one grandfather's grandfather's grandfather's daughter's son he shall obtain it all: if there are several grandfather's grandfather's grandfather's daughter's sons, they shall all receive equal shares." Shades of the commoners of Charles II, who drafted the Statute of Distributions, what think ye of this! What bunglers were ye! What mere journeymen legislators! How incomplete was your work! How limited must have been your notions of relationships and kinships!

To return, however, to our text. Our author traces the history of wills from the days of the Normans, through the times of the Danes, (King Kanute made a will) and the Anglo-Saxons, (extracts are given from the will of Alfred, who had some doubts as to whether his money amounted to £200 or not) down to the present age, in a graphic, easy and interesting manner, *calamo currente*.

Nuncupative wills are still permitted in the Republic in the case of soldiers in actual military service, or mariners and seamen at sea, and in some states, of persons *in extremis*. Julius Cæsar first allowed the military testament to soldiers, but ever since the days of Justinian it has been confined to those engaged on an expedition; sailors, too, must be actually serving on shipboard to enjoy this privilege. In New York it has been held, that a sailor employed on the Mississippi is not within the statute allowing these wills: *Re Givins will*, 1 Quck. 44, so we feel rather inclined to speculate how it would be under our own 36 Vict. cap. 20, where it speaks, "if any mariner or seamen being *at sea*." Would ploughing our beautiful inland lakes be considered *being at sea*? A cook on a steamship is within the act (4 Brad. 154).

There was a time, now happily for the lawyers gone by in most places, when Lord Hardwicke could truly say, "there is nothing that requires so little solemnity as the making of a will of personal estate; there is scarcely any paper writing which will not be admitted as such:" *Ross* v. *Ewar*, 3 Atk. 156. In the present day the law insists upon certain solemnities in the execution of every will to properly evidence the testator's act and intention, and without them the will is absolutely void. Still in some of the states (California for instance) a holographic will is valid without any formalities; for example the following document was held perfectly good:

"Dear old Nance,—I wish to give you my watch, two shawls and also $5000.

Your old friend

E. A. Gordon."

Pacific Law Rep. Nov. 9, 1877.

A will may of course be in any language, and written in ink or pencil, but one of the courts in Pennsylvania considered that a writing upon a slate could not be held to be a will because of its want of permanency. It appears that the requirements of the New York statute as to execution are of the strictest nature; four things are essential, the testator must sign at the end of the will in the presence of witnesses, declaring it to be his will at the time of signing, or acknowledging it, and the witnesses must be two in number, signing at the end at the request of the testator. All these things must take place at the same interview, one act immediately following the other without any interval or interruption: *Doe* v. *Doe*, Barb. 200. It must appear, too, that the witness must be able to prove all these essentials in case of dispute. There has been a great deal of hair-splitting in some states as to what is a signing in the presence of the testator as required by some statutes, and our author says that it would almost seem from the decisions that the validity of the act depended upon the range of the organs of sight of the devisor, or upon the agility of his movements, whether he will be able to turn his body to the foot of the bed or stretch his neck out of the door.

The youths of California, Connecticut and Nevada must be rather precocious for at the age of eighteen they are allowed to make their last wills and testaments. Notwithstanding the authority of Blackstone and Bacon's abridgement to the contrary the law now allows deaf and dumb persons to exercise the power of devising their estates "if the mind accompanies the will."

"There is no investigation in the whole domain of law that is attended with so many lamentable phases, where the foibles, indeed, the ludicrous side of human nature are more exposed than in the inquiries as to the testamentary capacity of testators, for it happens that those who will most carefully and tenderly screen a man's weaknesses, vagaries and eccentricities whilst he is living, will if a contest takes place in which they are interested after his death, most readily reveal in all their nakedness and boldness of outline the infirmities and superstitions of the deceased." The American decisions agree with the English, that to set aside a will on the ground of monomania it must be proved, first, that it is wanting in natural affection and duty; and secondly, that there was a morbid delusion actually existing at the time of the making in respect to the persons cut off, or prompting the provision's of the instrument. Mere eccentricity will not invalidate a will.

Mr. Wm. Kinsett was an eccentric individual, he preferred cremation to burial, and so left his body to the directors of the Imperial Gas Company, London, to be placed in one of their retorts and consumed to ashes; if the directors would not do this, he directed that his remains should be interred in the family grave, St. John's Wood Cemetery, *to assist in poisoning the neighborhood.* Some judges have taken upon themselves to refuse to grant probate of wills because the testator had evinced great fondness for the lower animals; in one case an old maid kept fourteen dogs of both sexes, providing them all with kennels in her drawing-room (Taylor, Med. Jur. 658). Another old maid maintained in her house a colony of cats, each of which had regular meals and was furnished with plates and napkins. Such strange fondnesses are by no means certain indications of insanity (Red. on Wills, I p. 84). We are given some curious

New York cases in which the rule regarding monomania is discussed. Mr. Thompson's will (2 Brad. 449) was a voluminous document and by it he gave tokens of his regard and respect to many of his kith and kin, but the bulk of his estate —some half a million, he left for charitable and religious purposes. To set aside the will it was shewn that he had held pertinaceously many vulgar superstitions; that he believed in the black art, practised magic, fraternised with disembodied spirits, worked spells, prepared amulets and cabalistic inscriptions for the cure of human ills; that he professed to know where Captain Kidd's treasures were hid; said he once saw the devil in the shape of a large bull; that he believed in dreams, in the philosopher's stone, in clairvoyance, spiritualism, mesmerism, magic glasses, and that he had a whistle with which he obtained anything he desired. On the other hand it was proved that this remarkable genius was a shrewd and intelligent man of business, was largely engaged in commerce, had accumulated great wealth, was connected with numerous monetary institutions, and was a regular attendant at a Presbyterian church. As there was nothing to connect any of these aberrations or infatuations with the provisions of the will, and as they had not affected the dispositions of it, the court held that it was perfectly valid and unimpeachable on the ground of monomania.

A Mr. Benard believed in metempsychosis, that an emperor might be sojourning in any animal he met, and once remonstrated with a person who had said it would be humane to kill an injured kitten because there was in it a human soul. In a suit to set aside his will on the ground of insanity, the judge remarked, that if the court is to ascribe insanity to a man because of his opinions or belief as to the future state, the logical deduction would necessarily be that the major portion of mankind are of unsound mind or monomaniacs.

Mr. Proffatt tersely remarks, that "people generally understand quite well what is meant by a legacy in a will;" so we may pass quickly over his clearly written chapter on the subject. Some of our readers will be sorry to learn that a condition, that if one's wife or daughter shall marry a Scotchman, she shall forfeit all benefit under the will, and the estate shall go to someone else, is a good and valid provision *Perrin* v. *Lyon*, 9 East. 170. A man may bequeath a legacy to his wife, provided she remains his widow, and it is a good conditional bequest; but such a condition as to a legacy given by a stranger is not good.

(To be continued.)

SELECTIONS.

NOTES ON CORONERS.

The office of coroner is of very ancient institution,—so remote, indeed, that its origin is not clearly known. It is certain that coroners existed in the time of Alfred, for that king caused to be executed a judge who sentenced a prisoner to death upon the coroner's record, without allowing him to traverse.* The office could formerly be held in England only by men of high dignity, and a statute passed in the reign of Edward I. provided that none but lawful and discreet knights should be chosen. Coke calls the chief justice of the King's Bench the chief coroner of the kingdom. As his name indicates, the coroner was originally an officer representing the Crown. His functions were those of a conservator of the peace, and in other respects of a ministerial deputy of the Crown. In the absence or incapacity of the *scyre-gereſa*, or shirereeve (our present sheriff), who

* Vin. Abr. 242.

was the deputy of an earl, the coroner took his place, He once had the custody of the rolls of the pleas of the crown, from which he was called *custos placitorum coronæ.*; and in the reign of Henry II. his title was *serviens regis.*

Part of his duties were fiscal, to "inquire of wrecks and royal fishes, such as whales, sturgeon, and the like." The statute* "De officio coronatoris" commanded him to assay all weights and measures according to established standards. The statute continues: "Also it is our pleasure, that as soon as any felony or misadventure do happen, or treasure be found unlawfully hid in the earth; or of the rape of women, of the breaking of prison, or man dangerously wounded, or of other accident happening,—the coroner immediately, upon notice, issue his mandate" to summon a jury. From which it will be seen that his functions were somewhat various.

An important branch of his duties as a fiscal officer was the forfeiture of deodants. *Omnia quæ movent ad mortem sunt deodanda;* all personal chattels, such as horses, wagons, cattle, ships, &c., which contributed to the death of any person, were sedulously pronounced "accursed things," and by a pious fraud of the church were forfeited to be distributed *in pios usus*,—usually paid for masses for the benefit of the deceased's soul. Infants being deemed incapable of sin, no deodand was necessary to purchase propitiation, provided the thing were at rest and the infant fell from it; but if the thing moved to his death, then it was a deodand. Some curious distinctions arose in course of time in the construction of the law upon this portion of the king's royal revenue. When a moving carriage caused the death, both horses and carriage were forfeited; but if the deceased fell from a wheel when not in motion, the wheel only was a deodand. If a man in watering his horse were drowned, it being the fault of the animal, the horse was forfeited; but if the man were drowned by the violence of the stream, the horse would not be a deodant. Where a man fell from a ship in salt water and was drowned, no deodand was due; but if he fell from a ship or boat in fresh water, the vessel was forfeited.*

Juries soon learned, however, that when a husband and father was killed in falling from his cart, it was something of a hardship for his family, already deprived of their support, to forfeit the horses and cart in addition to their other loss, and therefore it became the custom to find that only some small portion, as the left fore-wheel of the cart, contributed to the death.† When a person was drowned in a well, the well was to be filled up.

In cases of *felo de se*, forfeitures included all goods and chattels, of the suicide, and consequently became of serious importance to the surviving family. And it is in allusion to the tortuous devices resorted to by claimants to save the forfeiture that Shakespeare puts into the mouth of the grave-digger the sapient speech about Ophelia's being drowned, not by herself, but by the water. The curious student may discover the original of this "crowner's quest law" in *Hales* v. *Petit*,‡ where it is solemly argued on one side that Sir James Hales is drowning himself had committed an act of felony during his lifetime, and, *per contra*, that the felony not being complete until death consummate, he committed none while alive, and therefore no forfeiture was due.§ Finally, the coroner's duty was to take cognizance of certain pleas of the crown, and to make inquiry in cases where "any be slain or suddenly dead or wounded." He held, as it were, the court of first instance; for formerly, in England, the coroner's jury performed the function of our grand jury · their investigation was the preliminary hearing of the case, and when their verdict accused any one, the "inquisition" was the indictment upon which the accused was tried; and accordingly the old reports contain instances of arrangement on inquisitions, traversing, and quashing. They were worded as carefully as indictments now are, and were in all respects treated as such.

These consequences now no longer result from the inquest. While the coroner in England still binds over a person inculpated by the verdict to appear at the next assizes, there is neverless instituted at the same time a parallel proceeding in

* 4 Edw. I.

* 1 Hawk. P. C. c. 26, §6. † Jervis, Cor. 204.
‡ Plowd. 260. § Wallace Reports, 103.

the courts, and if an indictment is there found, the accused is tried on that alone. If the courts fail to return an indictment, however, he is still obliged to appear at the assizes, and there be discharged. In this country, the coroner's inquest has no such consequences; indeed it has no consequences at all. No prosecution is ever based upon it; it is not used or referred to at the subsequent trial. And although a coroner is by statute authorized to cause the arrest of one accused by the verdict, it is only to bring him before some magistrate for examination. Practically, however, this power is very rarely invoked, as the suspected person is almost always in custody before the coroner has any knowledge of the case.

The coroner's jury is as ancient as the coroner himself. But formerly its members were the accusers or witnesses rather than the judges, and were summoned from the neighborhood as persons likely to be acquainted with the facts. They might formerly, from their own knowledge, and without having any evidence brought before them, return a verdict. Though still sworn to return a true inquisition according to their knowledge and such evidence as should be laid before them, they are no longer witnesses; nor, indeed, ought a juror to communicate facts within his knowledge to his fellow-jurors, unless he testifies under oath; and the better practice in such a case is to inform the coroner before the impanelling of the jury that he desires to testify, and not to serve as a juror. If the phrase "your knowledge" in the oath has any meaning at all now, it probably has reference to such information as the jurors shall obtain from occular inspection of the body, the premises, the instruments used, or other things brought to their attention.

Sudden deaths, not accompanied by suspicious circumstances, it was not within the coroner's province to inquire of. "The dying suddenly," says Jervis, "is not to be understood of a fever, apoplexy, or other visitation of God; and coroners ought not in such cases, nor indeed in any case, to obtrude themselves into private families for the purpose of instituting inquiry, but should wait until they are sent for by the peace officers of the place, to whom it is the duty of those in whose houses violent or unnatural deaths occur to make immediate communication. But under whatever circumstances, this authority must be exercised within the limits of a sound discretion; and unless there be reasonable ground of suspecion that the party came to his death by violence and unnatural means, there is no occasion for the interference of the coroner." The Court of King's Bench have repeatedly censured coroners for holding frequent and unnecessary inquests for the sake of enhancing their fees, where there was no reasonable probability or suspicion that the deaths occurred from violence or unnatural causes, as where bodies were washed ashore, evidently drowned by the ordinary perils of the sea. In one case, where a woman died of a fever resulting from amputation, and a coroner threatened to hold an inquest and extorted money for abstaining from it, for which offence he was sentenced to pay a fine of £100 and to imprisonment for six months, Mr. Justice Grose, in passing sentence, said that the coroner, under these circumstances, had no pretence or authority for taking any inquest at all; but, if the case warranted his so doing, he was equally criminal in having extorted money to refrain from doing his office.* And Lord Ellenborough, in *Rex* v. *Justices of Kent*, observed that there were many instances of coroners having exercised their office in the most vexatious and oppressive manner, by obtruding themselves into private families, to their great annoyance and discomfort, without any pretence that the deceased had died otherwise than by a natural death, which was highly illegal.†

If this is the construction of the English statute, whose words are that the coroner is to make inquiry upon such as "be slain or suddenly dead or wounded," *a fortiori*, would it apply in this country, where, as in Massachusetts, the statute authorizes inquests "upon dead bodies of such persons *only* as shall be supposed to have come to their death by violence;" ‡ and the Revised Statutes, from which this provision is copied, stated further, "and not when the death is believed to have been occasioned by casualty."§

It is well known that coroners now

* 1 East, P. C. 382. † 11 East, 229.
‡ Mass. C. S. 275, § 1. § Rev. Stat. c. 140, § 1.

frequently hold inquests when the death can by no possible construction be brought within the terms of the statute. But this attempt at enlarging their office and fees is by no means a new or recent device on their part. So long ago as the reign of Henry VIII. the endeavor to extend the statutes to cases of palpable misadventure, as well as of homicide, caused the legislature to enact that if a coroner should take fees for holding inquests in cases of accident, he should suffer a penalty of forty shillings for every person dead by misadventure.*

It is amusing to read now-a-days that anciently the office was of such great dignity that no coroner would condescend to be paid for serving his country; indeed, the Statute of Westminister 1, c. 10, which is an affirmance of the common law, enacted that a coroner demanding remuneration to do his duties should suffer a great forfeiture to the king;† and for not having lands and tenements sufficient in the county to maintain the state and dignity of his office,‡ and for being *communis mercator*,§ coroners were in those days removed.

Ever since the days of Shakespeare, coroners and their proceedings have been a butt and laughing-stock. Unfreville, who wrote with devout sobriety, and was himself a coroner, is obliged to warn coroners that notice of a violent death should be received regularly from the peace officer, and to plead that it should not be secured "meanly by himself or emissaries to run or hunt after the dead, as I fear is too commonly the practice." And elsewhere he is forced sorrowfully to acknowledge that "the office itself is in desipse." He wrote over a century ago; but it may be questioned whether his good advice has been followed. That this ridicule is only too well earned, countless anecdotes of coroners and their juries attest. One of the latest is the following from England, taken from a recent number of the *Medical and Surgical Journal*:—

"A drunken man struck a furious blow at his brother, and fell dead, the blow not being returned. A *post-mortem* examination was ordered, and the surgeon was able to give positive evidence that the man died of apoplexy, without a sign of personal injury. In spite of this evidence the coroner directed the jury to find a verdict of 'manslaughter,' and then delivered himself as follows: 'E. R., these twelve gentlemen have made a very careful inquiry into the death of your brother, and, considering the provocation you received, have thought it their duty to bring in a verdict of manslaughter instead of murder, and it is therefore my duty to commit you to prison on that charge; but I wish you to remember, that although you may escape the punishment of death, yet I have no doubt that in the sight of God a man who kills his brother is more guilty than one who does not.'"

These well-authenticated cases call for our pity no less than our wonder that such proceedings are allowed to continue. It is as if a demented harlequin robed in motley rags sat in state with a tinsel crown and sham sceptre, and issued his mandates of ponderous import to his imaginary subjects. Few only laugh at them, no one ever heeds them.

One of the most marvellous features about this whole matter is the good-natured forbearance and indolence with which the office and its abuses have been tolerated, without any serious attempt at their reformation or total extinction. It had been apparent for centuries that the office was practically of no use; that its functions had in course of time been absorbed by courts of justice and other agencies better fitted for their discharge, and that their continuance in the coroner was of no service to the cummunity; that the grossest ignorance paraded itself in the anciently honored and important office; that it had grown to be a prolific source of corruption and abuse: and yet it was not until last year that the outrageous proceedings in two cases in Great Britain, and several others in this country, awakened public attention to the need and importance of a charge. Once thoroughly aroused, men see the great peril and scandalous reproach to the administration of law which exist under the present system, and are, at last, fairly prepared to lay the axe at the root of the evil once and for all time.

The two cases in Great Britain well illustrate two opposite kinds of abuse which flourish under the present law, the first due to the gross ignorance and incapacity of the average coroner as a judicial investigator, the other to the officious zeal which under the claim of duty obtrudes itself upon the privacy of a mourning household, without cause or justification.

* 1 Hen. 8, c. 7.
† 2 Inst. 176, 210.
‡ 2 Inst. 182.
§ 2 Inst. 32.

Charles Turner Bravo was a young barrister, of strong constitution and sound health, who had recently been married to a widow possessed of a handsome income. One day after dinner he was taken suddenly and violently ill, and showed all the symptoms of metallic poisoning. To the physicians who were called he resolutely denied having taken such a poison, though Mrs. Cox, a companion of his wife, afterwards told them that he had confessed to her that he had taken it, and implored her not to tell his wife. In the course of the next day he died. Chemical analysis of the vomited food and of the contents of the intestines conclusively proved it to be a case of poisoning by tartar emetic. At his last meal Mr. Bravo had partaken of all the food in common with his wife and Mrs. Cox. The only thing which he alone had used was a bottle of Burgundy.

The resolute denial of the deceased *in extremis* to his physicians that he had taken poison, although informed in the most solemn terms by Sir William Gull that the consequences of his denial might be to throw suspicion on some one else, and the apparent absence of motive for an act of self destruction, occasioned doubt as to his having committed suicide. The coroner, however, adopted from the first the theory of suicide, heard only a portion of the testimony. No examination was suggested of the wine remaining in the bottle, nor was it accounted for; no inquiry was made as to where the tartar emetic was procured; the wife of the deceased was not examined; and the coroner positively declined to examine one of the physicians who had been in attendance, and who offered to testify.

The necessary result of this perfunctory proceeding was a verdict that the deceased died from the effects of antimonial poison, but how or by whom the poison was administered there was no evidence to show. In other words, the only fact found by the verdict was that which the medical inquiry satisfactorily established, that the death had resulted from poison; and the only purpose for which an inquest is ever justifiable,—to ascertain whether a crime had been committed or not, was left wholly out of sight.

Certain suspicious circumstances in the case and the position taken by the medical gentlemen in attendance on the deceased caused the whole matter to become notorious; and such was the public indignation aroused by this palpable farce and miscarriage of justice, that the attention of the government was drawn to the case. The Attorney-General moved the Court of Queen's Bench to quash the inquisition, and have a special commission appointed to hold another inquest. The Solicitors of the Treasury were set at work upon the case, and after many weeks of a most searching and careful investigation, during which all manner of collateral inquiry was indulged in, attended on both sides by eminent counsel, the second verdict was returned to the effect that Mr. Bravo did not commit suicide; that he did not die by misadventure; that he was wilfully murdered by having tartar emetic administered to him, but that there was not sufficient evidence to fix the guilt upon any person or persons. If a crime was here committed, the failure of the coroner to inquire into facts clearly connected with the death—such as examining the contents of the bottle from which Mr. Bravo alone had partaken at his last meal—probably defeated the ends of justice; if it was not a case of crime, but of suicide or accident, the hurried and slipshod manner in which the first inquiry was conducted aroused a painful suspicion, and occasioned a long and expensive, and, as it proved, fruitless investigation. In either view of the matter, proper care and a decent regard for the important interests involved would have insured the utmost care at the first hearing, and obviated the needless and scandalous second inquest.

Sir Charles Lyell, the eminent geologist, died after a lingering illness, resulting mainly from his advanced age. Some time previous to his death he had stumbled on the staircase, and fallen in such a manner as to inflict some injury, which probably, in his already weak state, hastened his decease. He had been attended by eminent physicians, who regularly certified the cause of his death. The body, encased in a leaden coffin and an oaken box surrounding it, was lying in his house ready for interment. At this moment Coroner Hardwicke, stimulated by an over-zealous officiousness, ob-

tained admittance to the house, and declared his intention to hold an inquest. Though remonstrated with, and fully informed that there was nothing in the facts calling for such a proceeding, he insisted upon holding the inquest, and, it is said, with his own hands aided in tearing open the oaken box and the leaden casket, and thereupon proceeded to view the body. This was too much for even tradition-loving England, and such a storm arose in consequence of this outrage, that even the previous good character and entirely blameless life of Dr. Hardwicke did not save him from most severe condemnation. Unless verbal changes have occurred in the statutes on the subject, it will be seen that this case comes directly within the principle laid down in the case above cited.*

In Prussia, Austria, France, and other countries of Europe, the coroner is unknown. In France the Procureur, the prosecuting officer, proceeds to the place where a crime has been committed, and makes the investigation. He has the power to summon witnesses and take their testimony in writing, which is read to and signed by them; to prevent egress from the house or departure from the neighborhood, when he deems it necessary; and to seize all papers and other articles supposed to be connected with the crime. He is authorized to take with him to the place of the crime one or two persons deemed by their art or profession capable of appreciating the nature and circumstances of the crime, and, where a violent or suspicious death is the subject of inquiry, he is aided by one or two health officers, always physicians, who are to report on the causes of death and the condition of the body. He is the person subsequently charged with the prosecution of the criminal.† In Austria this function likewise devolves upon the public prosecutor.

In Prussia the judge of first instance, assisted by a surgeon, an actuary, and two officers of the court, makes the investigation. The procedure there is as well by hearing testimony for and against the accused as by repeatedly questioning the accused with a view to obtaining a confession.‡ In Scotland, though the name of "crowner" is still known, a Procurator Fiscal, corresponding to the Procureur of France, performs the duties of the first investigation. None of these countries have a jury on the preliminary examination.

Cogent reasons in favor of these systems exist, and in some of the late discussions in England the Scotch method has been strongly advocated. Certainly the practice in these countries is more logical and reasonable than that of England and our country. Laying aside for a moment the traditional and historical associations of the office, in our day *the sole purpose of the coroner's office in the detection of crime.* That is a subject matter for legal inquiry. But a portion of that inquiry, where a dead body is found, is necessarily, first, to determine whether a homicide has been committed at all, or whether the death is in the ordinary course of nature. This feature is clearly matter for medical science, to be decided upon an inspection and examination of the body. The fact that a homicide has been committed being established, the only remaining question is, how and by whom was it done. This involves the testimony of witnesses to external facts, and the taking of testimony is a judicial duty. Until crime is suspected, the question is medical; the moment crime is suspected, it is wholly legal. What the crime is under the law; whether the manner and circumstances of its commission constitute one degree or another; what testimony is admissible and properly bears upon the issue,—these are all legal questions, unmixed with medicine. Nothing can be more logical than to impose the duty of making this inquiry upon the ordinary agencies intrusted with the discharge of judicial functions. In England and our own country we do intrust all subsequent steps in the conduct of the criminal cause to the judicial tribunals. Indeed, we employ the tribunal of last resort and the highest law officer of the State to conduct it. We guard with the utmost care the rights of the accused, by allowing him the right of challenge, the assistance of counsel, and the process of the State to compel the attendance of witnesses. In these latter stages we are duly conscious of the grave trust committed to

* 1 East, P. C. 382. † Teulet, Les Codes 1860.
‡ Mittermayer's Feuerbach's Lehrbuch.

our charge. But in the earliest and often most important part of the inquiry, when the deed and its traces are fresh, we commit the care of the case involving the life of a fellow-being and the welfare of the State, to an officer not attached to the courts, and forming no part of the judicial system, generally not even a lawyer, much less skilled in the delicate and intricate questions that may and must arise in every such inquiry. And this is done in England and here, not upon any logical ground or for any valid reason, but from a blind reverence for tradition and antiquity, and in spite of all reason, logic, and common prudence. No one of us would think of committing his private affairs to a person wholly unskilled; and yet, as States, we lazily follow the old beaten track, suitable enough for a time when a single officer was intrusted with the greatest variety and diversity of duties, and for an age when a verdict of "died by the visitation of God" was all-sufficient to account for what want of perseverance and skill failed to dicover.

The most potent word as yet spoken on this subject in Great Britain is the admirable address of Mr. Herschell, before the Social Science Congress at Liverpool, in which he shows clearly the folly and danger of the present system, and advocates the establishment of a mixed tribunal, consisting of one medical man and one or two lawyers, to conduct these preliminary examinations.

The coroner's jury, it is agreed on both sides of the water, is a wholly useless and somewhat objectionable body. In the first place, the manner of their selection in this country by a constable is not calculated to produce good material; and, in fact, the ignorance and worthlessness of this body in point of character and intellect are proverbial. But when, in addition, it is remembered that they add nothing to the value or efficacy of the proceeding; that any intelligent professional man can reach a correct result more easily and much sooner unimpeded by twelve or six uninformed men than with them; that, so far as any results flow from their work, it is altogether useless, *nothing whatever* being done with a verdict after it is found, as it is neither the basis of, nor any assistance in, any later proceedings, and the criminal courts proceed wholly without respect or reference to it; that it protects no one, as there is at that stage no one accused; that, therefore, it is no safeguard, and that in the slow, cumbersome process before it much precious time is lost, often to the detriment of justice; when, finally, it is considered that the publicity of the proceedings, the loose and vague manner of conducting them, and the vast mass of irrelevant and often highly improper matter which the coroner, ignorant of the rules governing the admission of valid evidence, suffers to be dragged into the case, tend directly to thwart justice, and, in our age of eager reporting, manifestly to demoralize and corrupt the public mind,—it is not apparent what benefits we deprive from a further retention of the jury. They aid in nothing, they retard and endanger much, and are a great expense.

In England, and in New York and several other of the United States, coroners are elected. In Massachusetts they are appointed by the governor and council. In Connecticut the office does not exist, a constable performing its duties.

The grave and responsible powers lodged in the hands of an officer, combining in his person the function of a medical expert, a witness, and a judge, are sufficiently apparent to made us watchful of their further abuse. The uselessness of their present procedure, compared with the truly valuable results to the cause of public health and safety which would follow a scientific distribution of their incongruous functions, is a sufficient warrant for abolishing the office as at present constituted, and dividing its duties between the professions respectively fitted for their discharge.

The coroner now exercises his choice in calling in a medical man to make the examination and autopsy. In the absence of sufficient legislation to prevent untrained persons from practising medicine, this method of carrying on the examination is no guarantee of special fitness, and is calculated to inspire distrust.

The medical officer should be a permanent appointed official, of high character and standing, whose duty it should be to make the preliminary examination of a dead body, and decide whether the death was violent or natural. In the

former case, he should at once notify a judicial officer, who should thenceforth take charge of the examination, leaving for the physician no other duty than that of testifying at the subsequent trial. The vast excess of inquests held over all reported statistics of crime is a strong indication that the existing coroners are very deficient in medical knowledge. In Boston, during the last fiscal year there were held four hundred and twenty-three views and one hundred and ten inquests. In Manchester, during the years 1863–1873 there were three thousand five hundred and five inquests held, in which the jury found that the parties had died "from natural causes." This monstrous number of apparently needless inquests caused the Watch Committee to report the fact to the City Council. Not only would this abuse be prevented by the appointment of competent and reputable medical men, who, by an intelligent examination, would in most cases be able to decide at once that the death was natural, and no further investigation needful, but their records would furnish a valuable contribution to the literature of medico-legal science.

On whom the remaining duty of taking the testimony and determining the law should devolve, is a question upon which there may be different opinions. Should the district attorney who has charge of the later conduct of the case officiate? Should it be a justice of some court? In favor of the first proposition, it may be said that since it is merely an inquiry into the facts and not a trial, and since the district attorney is the person who most needs the information subsequently, we may in that respect adopt the prevailing practice of continental states in Europe. Moreover, as an accusation is often as ruinous to a reputation as actual proof of guilt, there is this advantage also in the Scotch system, that the inquiry is carried on quietly until some ground for open action exists. A case which illustrates the benefits of this system is that of a Scotch physician, who, being annoyed by the settlement and popularity of a quack near him, instituted proceedings against him under the Medical Practitioners' Act. The quack thereupon notified the Procurator Fiscal that a patient of the doctor's had died in consequence of malpractice. The remains were disinterred, and furnished positive proof that the charge was false. A public inquest, whether inculpating or exonerating the physician, would certainly have proved his ruin, especially if, as might have been the case in Massachusetts, the quack himself had been the coroner who instituted and conducted it. The same advantage would be secured, however, in a proceeding before a justice of some court where only material evidence would be admitted, and the mass of incompetent and pernicious matter that is always brought out before a coroner would be wholly excluded.

But one consideration seems to be decisive against this proposition: our system of criminal prosecution is at variance with that of the countries where this practice prevails, and the very fact that with us a neutral body intervenes between the prosecutor and the accused, which, by a perfectly well-established law of human action, necessarily heightens the zeal of the prosecutor, must for ever prevent us from uniting the prosecutor and judge in one person. Every person familiar with the administration of criminal law knows the tendency of a prosecutor to consider every accused person guilty. Our judiciary wisely recognize this in assigning the various justices by turn to preside over criminal trials, instead of appointing one permanent criminal judge.

Judicial functions must not be intrusted to a partisan; and a public prosecuting attorney represents the State, which is a party. A judge must be the unbiassed guardian of the interests of both parties, —of the accused no less than the State. The danger just pointed out was forcibly illustrated at the second inquest in the Bravo case, where Mr. Serjeant Parry felt compelled to remonstrate against the evident purpose of the Crown counsel to fasten guilt upon three certain persons.

On the other hand, there seems to be no good reason why the preliminary processes of a criminal investigation should not be intrusted to the agencies charged with its subsequent conduct. As previously mentioned, the criminal courts of first instance, before binding over a suspected person, are obliged to hear the whole testimony *de novo*, unless the prisoner chooses to waive the examination.

And the only difference between this examination and that carried on before a coroner is, that in the court there is an accusation, whereas before the coroner there is as yet none. The coroner's proceeding, therefore, has the one advantage over the court's, that witnesses can be summoned and compelled to testify before any prosecution is instituted. But nothing can be simpler than to transfer this right also to the courts. As the hearings before the coroner are, after the view, held out of sight of the body and remote from the place of the crime, the evidence being brought together by police-officers mainly, it seems equally feasible to conduct the hearing in a court-room, especially as the proposed change, giving the physical examination wholly into the hands of responsible medical men, makes it unnecessary for the judge to view the body.

The district attorney, being the public prosecutor, should have charge of the search for the facts, and, when gathered, should lay them before the magistrate, who, without a jury, should make a report of his finding, and, if he finds cause therefor, should thereupon institute the prosecution.

The proposed changes, therefore, are:

1. The abolition of the coroner's jury.

2. The abolition of the office of coroner as at present constituted, and the division of the coroner's functions between—

a. Medical officers to make the physical examination and testify to its results.

b. Judicial officers to bear the testimony and apply the law.

3. The appointment of permanent medical officers of high character and standing for the former duty.

4. The transfer of the latter duty to the courts of first instance or the commiting magistrates.—*American Law Review.*

WHAT ARE CRIMINAL FALSE PRETENCES?

In England and in nearly all, if not all, of the American states, there are statutes against what is called obtaining goods by means of false pretences. By some of these statutes this offence is made a misdemeanor, by others a felony. The statute 24 and 25 Vict., ch. 96, sect. 88, provides that: "Whosoever shall, by any false pretense, obtain from any other person any chattel, money or valuable security, with intent to defraud, shall be guilty of a misdemeanor." The statutes upon this subject are generally of a similar character; and are the outgrowth of the common-law doctrine upon the subject of cheats. They have been enacted to meet the wants of "the extended trade and more refined culture of modern times," which "require a certain degree of universal confidence to be placed in the mere verbal representations of men." It may be safely affirmed as a question of morality, that any attempt by one party to influence another by artifice or trick, and to induce him to part with his goods without receiving a true equivalent therefor is vicious. But it must not be understood that every immoral attempt to obtain an advantage in trade is criminal. "These statutes," says a learned author, "are construed in reference to the spirit and reasons of the common law; and they do not, therefore, extend, as the non-professional reader might suppose, to every imaginable kind of false pretence;" Bishop's Cr. Law, vol. 1, § 1019. What, then, are false pretences within the statute? In *Regina* v. *Lince*, 12 Cox's Cr. Cas. 451, the pretence charged was that the prisoner lived at a certain beer-house and was the landlord thereof, and this was held to be within the statute; the evidence showed that the prisoner did not say he was the landlord, but only that he lived at the house; and the prosecutor testified that he was influenced by the belief that the prisoner was the nephew of his servant as well as by his assertion that he was the occupier of the beer-house; the prisoner was found guilty and the case was reserved for the opinion of the court of criminal appeal. Upon the appeal it was held that the pretence proven was sufficient to sustain the conviction, and that it was immaterial "that the prosecutor was influenced by other circumstances than the false pretence."

In *Regina* v. *English*, Ch. J. Cockburn held that it was criminal to falsely pretend, with intent to defraud, that a certain field was a good and profitable brick-field; and that it was sufficient to show that the prosecutor was partly influenced to do 22 what he did by the pretence: Cox's Cr. Cas. 171.

In *Regina* v. *Jennison*, 1 Leigh & Cave 157, the prisoner had falsely represented to a woman that he was unmarried, and promised to marry her, by means of which he obtained money from her. It was held that the false promise was not the subject of an indictment, but that the false pretence was. See *Rex* v. *Young*, 3 Term R. 98; *Rex* v. *Airy*, 2 East 30; *Regina* v. *Capeland*, Car. & Marsh. 516.

The secretary of an Odd Fellows' lodge falsely represented to a member that he owed the lodge a sum of money, and so obtained the money; and it was held that he was rightly convicted of obtaining money by false pretences: *Rex* v. *Wooley*, 1 Den. C. C. 559.

To falsely pretend that one lives with and is employed by another, is within the statute: *People* v. *Johnson*, 12 Johns. 292. In *People* v. *Dalton*, 2 Wheeler's Cr. Cas. 161, the defendant had falsely pretended that he was a grocer and resided at a particular place, and it was held to be criminal.

A false statement by a buyer of goods that he was solvent and never had a note protested, was held a criminal false pretence: *People* v. *Haynes*, 11 Wend. 557. This case was afterwards reversed, but not upon this question; s. c. 14 Wend. 547. See *Commonwealth* v. *Davidson*, 1 Cush. 33.

In *Thomas* v. *The People*, 34 N. Y. 351, the pretence charged was that the defendant was a chaplain in the army, and it was held sufficient.

It is a pretence within the statute to falsely represent that a bank check is good and of the value stated on its face: *Maley* v. *The State*, 31 Ind. 192.

Pretences as to a person's pecuniary condition, or his business, situation, residence, or standing in life, have all been held criminal, if made falsely with intent to defraud; and the cases cited furnish illustrations. The general principle to be deduced from these cases is: that whenever a person falsely represents, as an existing fact, that which is not an existing fact, with knowledge of the falsity of the representation, and with intent to defraud, and so obtains anything of value, the offence is complete.

Some of the American cases lay down the doctrine that the pretences, to be criminal, must be of a character calculated to deceive a man of ordinary caution: *State* v. *Simpson*, 3 Hawks 620; *People* v. *Haynes*, 11 Wend. 557; *State* v. *Magee*, 11 Ind. 154.

The construction of the statute given by these cases is certainly open to criticism. It is not warranted by the language of the statute, which speaks of "any false pretences," and it requires the selection of an ideal intelligence, and tests all cases by the inquiry, whether the pretences are such as are likely to mislead the person possessing this intelligence.

If by means of any false pretences one person obtains the property of another with intent to defraud, it ought to be said, as was said in *Greenough's Case*, 31 Verm. 279, "it is no good reason for the offender to allege that, by the use of due diligence or ordinary care, the imposition might have been prevented."

If the principle, that want of caution on the part of the victim is a sufficient shield for the swindler, is sound, there is no reason why it should not be extended to other offences. In an unguarded moment a rascal obtains another's money by a trick; the owner of a horse leaves his stable door unlocked, and a thief steals the horse; when the first is prosecuted he says: "This man was a fool; if he had exercised ordinary caution, I could not have imposed upon him;" and the law acquits him; when the horse-thief is put upon trial, he says: "If the owner of this horse had used ordinary caution and locked his stable door I could not have stolen his horse;" and must not the law acquit him also? To be consistent it must. The illustration demonstrates the absurdity of the doctrine. It is nothing more than the introduction into the criminal law of the principle that negligence on the part of the victim constitutes a defence for the criminal. The true principle is: "If the prosecutor believed the pretence, and parted with his property relying on it, there is no need he should have acted in the transaction with ordinary care and caution;" Bish. Cr. Law, vol. 2, § 440.

It is practicably impossible "to estimate the weight of a false pretence only by its effect. It is not an absolute thing, to be handled and weighed, as so much

material substance; it is a breath issuing forth from the mouth of man, and no man can know what it will accomplish only as he looks at its effect. * * * And no man of business was ever found so wary as not to commit at some time in his life a mistake therein, which any jury of twelve men would say on their oath could not be done by a man of ordinary judgment and discretion;" Bish. Cr. Law, vol. 2, § 416.

In *Young's Case*, 3 Term R. 98, Ashhurst, J., thought the interpretation of the statute could not be restrained "to such false pretences only, against which ordinary prudence cannot be supposed sufficient to guard." And this it seems is the view taken by the English courts at this day. See Russell on Crimes, vol. 2, p. 288; and Mr. Greaves's note.

In *Jones* v. *The State*, 50 Ind. 473, the court states the true doctrine upon this subject when it says, the laws "are not made for the protection of the shrewd and vigilant man only, but for the entire community." But with singular inconsistency the learned judge who wrote the opinion continues to say: "In the enactment of criminal laws the legislature adopts, as a standard of intelligence, neither the highest or the lowest, but the medium." What is the medium? Such a standard is purely ideal. Where is that man to be found who possesses the exact medium between the highest and the lowest intelligence? In the application of such a rule the result will vary according to the views of the individual who occupies the position of judge. One may think the means employed calculated to deceive a person of ordinary caution; another may think none but a fool would be imposed upon by such means. If such a standard is adopted is the law a protection for the "entire community?" Where is to be found the protection for that unfortunate class who are below the medium in intelligence? If the law is designed to protect the entire community, then the lowest in intelligence as well as the highest, the most imprudent, incautious and credulous are within its pale as well as the shrewd and vigilant; and it is safe to say that the former more frequently than the latter need the protection of the law. If the law is designed to protect only those who are of medium intelligence and of ordinary prudence and caution, then all who are below this standard are at the mercy of every trickster, and may be cheated *ad libitum*.

There is no principle which will support such a construction of the statute against false pretences. The criminal quality of an act resides in the intention, and does not depend upon the means adopted to accomplish it. If the criminal intent is manifest, it will not do to say the act is not criminal because the means employed to accomplish it were not such as are ordinarily calculated to produce the result intended.

If I kill a man with felonious intent, shall I say I am not guilty of murder solely because I employed an agency not ordinarily calculated to produce death?

It may be more difficult to derive the intent from the act in such a case, but the intent once established, the act is criminal in the same degree as if the means employed had been such as are ordinarily adequate to the end sought. So it may be more difficult in a case of false pretences to derive the intent to cheat from pretences not ordinarily calculated to deceive; but when the intent is established, the accused cannot exonerate himself by saying that the person cheated ought not have relied upon the pretences. This exposition of the law may not commend itself to that class of persons who think it neither immoral nor unlawful to resort to artifices, tricks and false pretences in their dealings with their fellowmen; but to honest, candid men, who believe that perfect integrity in business transactions is a jewel that should be preserved untarnished, the construction of the statute contended for in this paper will appear just, not only according to its letter, but upon the broadest principles of morality.

Using the language of one of the most eminent judges that ever sat in any court, "I am yet to learn that a law which punishes a man for obtaining the property of his unsuspecting neighbor, by means of any wilful misrepresentation, or deliberate falsehood, with intent to defraud him of the same, is establishing a rule of morality which will be deemed too rigid" for respectable and fair business men.

—*American Law Register.*

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH.

Morrison, J.] [June 9.

ALLAN v. McTAVISH.

38 Vict. cap. 16, sec. 11—Statute of Limitations—Covenant in mortgage.

Demurrer—Declaration on covenant to pay money on mortgage. Plea, that the plaintiffs claim did not accrue within 10 years. *Held*, that the new Statute of Limitations, 38 Vict. cap. 16, sec. 11, applied to this case and that the plaintiff could not maintain the action.

Galt for plaintiff.

Ferguson, Q.C., for defendant.

REGINA v. WALKER.

Master and servant—38 Vict. cap. 20, sec. 19, O.

Where an apprentice absents himself without leave from his master's employment, the application to compel him to make up the time and for punishing him in case he refuse to make up the time, must be made after the term of service expire. In this case a conviction having been made during the currency of the articles it was quashed.

Bigelow for the apprentice.

Robinson, Q.C., and *Roaf*, contra.

CANADA REPORTS.

ONTARIO.

(Reported for the *Law Journal* by H. T. Beck, M.A., Student-at-Law.)

CHANCERY CHAMBERS.

McTAVISH v. SIMPSON.

Service, admission of.

An admission of service after hours will be taken as service on the following day, although no hour is mentioned in the written admission, if the party served give verbal notice at the time, or at least with due promptness, that he will consider the service as of the next day.

[May 9.—Mr. Stephens.]

This was a motion to set aside a notice of hearing as served too late or in the alternative to postpone the hearing on the ground of absence of witnesses. Notice of hearing was served after 3 o'clock p.m., on Saturday, 28th April, for the sittings to be held on May 13th. Service had been admitted on Saturday without any objection being taken as to the hour, but shortly afterwards the plaintiffs were notified that the defendants would consider the service as of Monday.

Bain for plaintiff.

Mr. Barwick (Bethune, Osler & Moss) contra.

The Referee thought that as the defendants were prompt in notifying the plaintiffs, their admission of service as of Saturday was not binding on them.

RE FLEMMING.

Lunacy, Declaration of.

Before the Court will declare a person a lunatic it will in general require medical testimony to the fact.

[May 15.—Proudfoot, V. C.]

This was an application for a declaration of lunacy, and for the appointment of a committee of the lunatic's estate. Affidavits of persons intimate with the party sought to be declared a lunatic, and which stated that the party was of unsound mind were read.

Proudfoot, V. C., before whom the motion was made, was of opinion that there was not sufficient evidence of lunacy, there being no affidavit of any medical man filed on the application.

McDONALD v. BEARD.

Lunatic—Committee—Guardian.

The power of the Court to appoint a guardian for a lunatic is unaffected by 34 Vict. cap. 18, sec., 15.

[May 15.—Ma. Stephens.]

Hodgins for the plaintiff applied for an order appointing a guardian for the defendant, a lunatic.

Kennedy, contra, contended that by 34 Vict., cap. 18, sec. 15, the inspector of asylums is *ex officio* the lunatic's committee. The inspector should have been made a party and would fully represent the lunatic.

The Referee thought that the power of the Court in such a case was unaffected by the act.

LINDSAY v. LINDSAY.

Order to produce—Non-production—Motion to commit—Service irregular—Terms.

An order to commit a party for disobeying an order will not be granted if it appears that there is any error or omission in the copy served.

[May 16.—Ma. Stephens.]

This was a motion to commit two defendants for not obeying an order to produce. The defendants' solicitor had been served with a paper which purported to be a copy of an order to produce. The original order was correct, but in the paper served as a copy the date was omitted, and the defendants' names were not inserted in

the style of the cause and there was another trifling omission.

Doyle contra.

Hoyles for plaintiff contended that the objections were merely technical, and that as the copy served was endorsed properly the defendants' solicitor could not have been misled. An affidavit was filed alleging that the defendants had refused to obey the order for the purpose of delaying the case. The Chancery sittings were being held and the plaintiff should not be delayed.

The REFEREE thought that on an application of this sort he could not grant an order unless a true copy had been served. The application was therefore dismissed, the plaintiff being allowed to amend the copy served *nunc pro tunc*, the defendants to have five days to file their affidavit, the plaintiff to pay the costs of the appli-application fixed at $6.

ALLAN v. MARTIN.

Vesting order—Mis-description.

A vesting order will be granted, vesting the property sold, without the execution of a new deed, when the original deed mis-describes it.

[May 16—MR. STEPHENS.]

This was a motion for a vesting order for John Battlier a purchaser. A conveyance had been executed, but one of the parcels was mis-described. An affidavit was read to the effect that there were a great number of parties, and that in consequence great expense would be incurred in getting a new conveyance executed.

The REFEREE granted the order on the production of the conveyance, the certificate of the master as to the error, and an affidavit that the land was sold according to the description now alleged to be the correct one.

VIVIAN v. MITCHELL

Commission—Parties, examination of—Evidence.

A commission to examine the parties will not issue where as in the case of fraud being set up, it might be conducive to the ends of justice, that either of the parties should be examined before the judge who tries the case, and their evidence is important.

[May 16.—MR. STEPHENS.]

This was a motion on the part of the defendant for a commission to examine witnesses (including the parties to the suit) at Prince Arthur's Landing, or for the trial of the issues at the following sittings of the District Court at Prince Arthur's Landing. There was to be a sitting of the Court the following month. It was alleged that there would be a large saving of expense in having the evidence taken at the place mentioned. The plaintiff urged that as he was charged with fraud it was important that his evidence should be given before the judge who finally disposes of the case: *Price* v. *Bailey*, 6 Prac. R. 256.

Mr. Eddis (Boswell & Robertson) for plaintiff.

Howland for defendant.

The REFEREE under the circumstances thought that the order should go for a commission to examine all witnesses except the parties themselves.

COMMON LAW CHAMBERS.

WATTS v. CANADA FARMERS' INSURANCE CO.

Pleading—Insurance policy—Assignment.

The conditions which must be complied with on the assignment of a policy of insurance only apply in the case of assignment prior to loss.

[April 20.—MR. DALTON.]

This was a motion to strike out pleas or to reply and demur. The declaration was on a policy of insurance assigned to the plaintiff after loss. The fourth plea to the whole declaration alleged that the assignment should have been on the back of the policy, and should have been approved by the defendants' secretary, which condition had not been complied with. The fifth plea alleged a breach of a condition as to giving notice of the assignment: *Waddell* v. *Prov. Ins. Co.*, 21 U. C. Q. B. 620.

Miller for plaintiff.

Holman for defendant.

MR. DALTON thought that the Act only applied to existing policies, prior to any right to recover damages, but that in this case there was in fact a sum of money due before the assignment. The order was therefore granted, striking out the fourth and fifth pleas.

CAVANAGH v. HASTINGS MUTUAL INSURANCE COMPANY.

Judgment, setting aside—Irregularity—Order, carriage of—Diligence.

The party obtaining an order is entitled to the carriage thereof unless he delay acting upon it. The filing with a deputy clerk of an order setting aside a judgment does not *ipso facto* set aside the judgment. It is the duty of the deputy clerk to set aside the judgment by noting the fact on the roll upon the filing of the order.

[April 23 —MR. DALTON.]

This was an application to set aside an interlocutory judgment. An order had previously been made in the cause setting aside a judgment by default as final instead of interlocutory. No time to plead had been allowed by the terms of the order; the plaintiffs immediately upon the

order being made issued a duplicate order setting aside the final judgment and entered interlocutory judgment on the day after the issuing of the order.

Mr. Aylsworth (Bethune, Osler & Moss) contended that as the final judgment roll had been sent to Toronto the judgment could not be set aside merely by filing the order in the Deputy Clerk's office: *Hornby* v. *Hornby*, 3 U.C. Q.B. 274. The papers should have been re-transmitted from Toronto: *Felton* v. *Exrs. Conley*, 1 Prac. R. 319. A minute should be made on the final judgment roll, and a fee is payable therefor. A defence on the merits was also alleged..

Holman for the plaintiff cited Ch. Arch. 988 and justified his haste on the ground that he would have been thrown over the ensuing Assizes had he not acted immediately. He also submitted that the defendants had purposely refrained from asking time to plead, as a term in the order, as under those circumstances they could not have had the costs. The time for pleading had expired at the time interlocutory judgment was signed. The defendants might have filed their order and pleas, and their proceedings could not have been set aside: *Robinson* v. *Stoddart*, 5 Dow. 266 It was the duty of the Deputy Clerk to have the papers re-transmitted, and the plaintiff has fulfilled his duty in handing him the order.

Mr. Dalton—The facts of this case are as follows:—Final judgment had been set aside by me on Friday. The plaintiff obtained a duplicate order which he sent to Sarnia, and which was then filed with the Deputy Clerk. The defendants took out the order, which they sent by Friday's mail to Sarnia, but which did not arrive there until after the duplicate order obtained by the plaintiff and until after interlocutory judgment had been signed. The Deputy Clerk had sent all the papers to Toronto immediately upon the signing of the final judgment. The judgment, consequently, was in Toronto, although no doubt both parties supposed the papers to be in Sarnia. It devolved upon the defendants to set aside the judgment. The defendants were entitled to the carriage of the order, and they were not guilty of negligence. I would therefore set aside the judgment, even if the papers had been in Sarnia. I think, however, as there was a mutual mistake, I can give no costs. The order will be to set aside the interlocutory judgment without costs, and that the papers be re-transmitted to Sarnia.

Order accordingly.

Whitelaw v. National Insurance Co.—Whitelaw v. Phœnix Ins. Co.

Postponement of trial.

Held, That when the original holder of a policy of insurance has been indicted for arson it would not be in the interests of justice to postpone a suit by the assignee of the policy until after the criminal trial.

[April 28—Mr. Dalton.]

These were motions to postpone the trial in suits by the assignee of two policies until after the trial of the assured for arson. The assured had assigned in both cases after loss, and had been indicted for arson. The civil cases and criminal prosecution were all to be tried at the ensuing assizes. The defendants alleged that much evidence was, in the interests of justice, being kept concealed by the crown for the present, and if the civil cases were postponed until after the criminal, they would get the benefit of this evidence. The plaintiff cited *Johnson* v. *Wardell*, 1 H. & W. 219, and contended that if insured were convicted on account of not being able, as a prisoner, to make explanations, the plaintiff would be prejudiced by such conviction, and that the assured might, as a witness, in the civil suits, make such explanations as would remove any suspicions, if the civil suits were tried first. The defendants contended that if the assured was convicted, the plaintiff had no right to recover, and that the case cited was not a parallel case.

Osler for plaintiffs.

W. R. Mulock for defendants.

Mr. Dalton—I think that as a matter of justice the civil cases should be tried first; I therefore discharge both summons.

Summons discharged.

Nelles v. Grand Trunk R'y Co.

Jury notice, striking out—Corporation.

In general a jury notice will be struck out on the application of the defendants when the claim is for unliquidated damages against a corporation.

[April 29.—Mr. Dalton.]

This was a motion to strike out a jury notice in an action for damages for the killing of three horses by defendants' railway. The plaintiff contended that in such a case there was no danger of a jury giving excessive damages, and that questions of fact were involved.

Holman for plaintiff.

Mr. Aylsworth (Bethune, Osler & Moss) for defendant.

Mr. Dalton thought that this was such a case as was contemplated by the legislature in passing the act, and granted the order.

Order accordingly.

HALDANE v. BEATTY.

Fi. fa's, setting aside—Administrator pendente lite—Executors.

An administrator *pendente lite* has no power to issue execution when the executors have proved the will.

[May 5.—MR. DALTON.]

This was a motion to set aside writs of *fieri facias* under the following circumstances:—One B. had obtained probate as executor under a will. W., widow of the deceased, who took no interest under the will, filed a bill to set the will aside. A decree was subsequently made, setting aside the will, and the plaintiff was, by order of the court, appointed administrator *pendente lite*. Another bill was filed to obtain the court's construction of a second will, and B., who was executor, obtained probate of this will. W, who had an interest in the estate of the deceased under the second will, made affidavit that B. was worthless and beyond the jurisdiction, and that if the estate came into his hands there was a great probability of its being squandered. Application was made to PROUDFOOT, V. C., who however refused to order the plaintiff to hand over the estate to B.

Donovan, for the plaintiff, contended that if the plaintiff paid over any money without the order of the court his sureties would be liable; that as he was administrator during the continuance of the suit he had a right to issue execution; that it would require an order of the court rescinding the order appointing him, and that the issuing of probate from the Surrogate Court to another did not divest him of his power as an officer of the court.

O'Donohoe, for the defendant, contended that as the costs of the suit had been taxed and the suit terminated, the plaintiff's office was therefore at an end.

Mr. DALTON thought that the plaintiff had no legal right to issue execution, whatever the rights of the parties might be in equity. The order was accordingly granted, setting aside the writs of *fieri facias*.

REGINA v. BELL.

Magistrate, powers of—32-33 Vict. cap. 28 & 32.

A conviction under 32-33 Vict. cap. 28 & 32 C. is bad where a fine and costs are imposed and in default imprisonment.

[May 11.—HARRISON, C. J.]

John Paterson applied for the discharge of a prisoner under a writ of *habeas corpus*, who had been fined in the Police Court $50 and costs, or in default imprisonment, for keeping a house of ill-fame. He contended that the Justices of the Peace who sat in the absence of the Police Magistrate had no power to act under 32-33 Vict. cap. 32. The magistrate had no power to impose a fine and inflict imprisonment in default of the fine being paid. The only means of collecting the fine was by distress warrant: *Slater v. Wells*, 9 C. L. J. 21. Under 32-33 Vict. cap. 28, the fine was illegal as the act gives no power to impose costs.

Meek for the Crown, contra.

HARRISON, C. J. thought that on the authority of the case cited, the conviction was clearly bad.

Conviction quashed.

RE S. & R., ATTORNEYS.

Attorneys' bills—Costs of reference.

An order is not necessary in order to issue execution for the costs of taxing an attorney's bill.

[June 15.—MR. DALTON.]

H. J. Scott applied for an order for the payment of costs of taxation of an attorneys' bill.

Mr. DALTON—Under the old practice when the master made his report it was made a rule of court, this however, is not now required, and the original order I think is sufficient authority for issuing execution for the costs taxed by the master.

Order refused.

MORRIS v. CITY OF OTTAWA.

Jury notice, striking out—Corporation.

When an action is brought to recover damages from a corporation the jury notice will in general be struck out.

[June 23.—MR. DALTON.]

This was an application by the defendants to have the jury notice struck out in an action for damages. The plaintiff submitted as there was a plea raising the question as to whether the place in question was a public highway or a part of the market, a view would be necessary, and that there was no statutory provision for a view by a judge; that the damages claimed were moderate and purely a question for the jury, and that the judge had power to submit questions to the decisions of the jury and enter the verdict himself.

Spencer for plaintiff.

Mr. Aylsworth (Bethune, Osler & Moss) for defendant.

Mr. Dalton thought that this case the jury notice should be struck out.

On an application to Morrison, J., for a summons by way of appeal from Mr. Dalton's order the summons was refused.

DIGEST.

DIGEST OF THE ENGLISH LAW REPORTS

FOR NOVEMBER AND DECEMBER 1876, AND JANUARY 1877.

From the American Law Review.

(*Continued from p.* 176.)

2. A company purchased iron works of G., and subsequently raised money upon its debentures secured by mortgage of all its funds, property, and effects. A year afterwards the company borrowed money of G. under an agreement according to which G. was to carry on the company's business and receive all moneys due the company, and apply them with his own loan in taking up acceptances of the company, and in paying the wages of its servants, and running expenses; and out of the remainder repay himself his loan with interest. The company was ordered to be wound up under the supervision of the Court, with whose sanction further advances were made by G. upon the same terms as before. Subsequently the property was sold by order of the Court. *Held*, the claims of the debenture holders were to be paid in priority to the running expenses and the sums due G.—*In re Regent's Canal Ironworks Co. Ex parte Grissell*, 3 Ch. D. 411.

3. It is not the duty of a trustee of a fund, who has himself a charge upon it created by the *cestui que trust*, to communicate the charge to a person who gives him notice of a subsequent charge.—*In re Lewer. Ex parte Wilkes*, 4 Ch. D. 101.

Protest.—*See* Bills and Notes, 3, 4.

Proviso.—*See* Annuity, 3; Mortgage, 1.

Railway.—*See* Estoppel, 2.

Release of Damages.

Declaration to the effect that the plaintiff was injured by a collision upon the defendants' railway caused by the defendants' negligence. Answer, that the defendants paid the plaintiff a certain sum on account of his injuries and that the plaintiff gave a deed of release. Reply, that the defendants procured the plaintiff to execute said deed by fraudulently representing that said injuries were of a trivial and temporary nature, and that if they should afterwards turn out to be more serious than the plaintiff anticipated, he would still, even though he had executed the deed, be in a position to obtain and would obtain further compensation from the defendants in respect thereof: also that said injuries proved more serious than the plaintiff anticipated when he executed said deed. Demurrer. *Held*, that the plaintiff's reply was good on the ground that it stated that the deed was executed in consequence of the defendant's misrepresentations as to the nature of said injuries. *Semble*, that fraudulent misrepresentation as to the effect of a deed can be relied upon as a defence to an action upon the deed.—*Hirshfeld* v. *London, Brighton, and South Coast Railway Co.*, 2 Q. B. D. 1.

Remainder.

1. A testator devised real and personal property to his daughter for life, "and after her decease the property to be equally divided between her children on their becoming of age." The daughter was one of the witnesses to the will, and the gift to her was consequently void under the 15th section of the Wills Act. The daughter had children living at the decease of the testator. *Held*, that there was a vested remainder in said daughter's children which they were to receive upon the determination of said daughter's life-estate, whether terminated by death or forfeiture; and that the forfeiture of said life-estate under said act, accelerated the remainder so that it took effect upon the death of the testator.—*Jull* v. *Jacobs*, 3 Ch. D. 703.

2. A testator devised his real estate to his two grandsons for life, remainder to their sons in tail, remainder in case said grandsons died without issue, to the testator's three granddaughters as tenants in common in tail with benefit of survivorship; and in case all said granddaughters should die without issue, leaving their father and mother or either of them surviving, then the testator gave said real estate to said father and mother and the survivor of them for life, and after the decease of such survivor to P. in fee. One of said grandsons survived the testator and all said granddaughters, but died without issue. One of said granddaughters survived both her parents. *Held*, that the remainder to said father and mother was vested, not contingent, and that P. therefore was entitled to said estate in fee upon the death of said surviving grandson.—*Leadbeater* v. *Cross*, 2 Q. B. D. 18.

See Contingent Remainder.

Remoteness.—*See* Annuity, 2; Perpetuity; Settlement, 1.

Rent-Charge.

A rent-charge charged upon a reversion in fee expectant on the determination of certain outstanding terms is a "free land or tenement" within 8 Hen. 6, c. 7.—*Dawson* v. *Robins*, 2 C. P. D. 38.

Reservation.—*See* Grant; Prescription.

Residuary Gift.—*See* Appointment, 3; Legacy, 7.

Restriction.—*See* Annuity, 3.

Reversionary Interest.—*See* Settlement, 5.

Sale.—*See* Bills and Notes, 1; Fixtures; Jurisdiction; Mortgage, 1; Partition.

Satisfaction.—*See* Legacy, 4; Settlement, 3.

Scrip.—*See* Negotiable Instrument.

Settlement.

1. By marriage settlement freehold property was conveyed to trustees to the use of M. for life, remainder to the use of all or any one or more exclusively of the children, grandchildren, or other issue of M., to be born before the appointment as M. should by deed or will appoint. M. by will appointed to the use of his son in fee, but in case he should have no child who should attain twenty-one, then after the decease of said son to the use of M.'s grandson, B. *Held*, that the executory devise to B., the grandson, was

void for remoteness; and that M.'s son had an absolute fee-simple in the estate.—*In re Brown and Sibly's Contract*, 3 Ch. D. 156.

2. H. by voluntary settlement assigned certain consols, mortgage debts, shares in a company, and furniture to trustees upon trust to pay her the dividends and allow her to use the furniture during her life; and after her death to invest and pay certain sums of money, part of the trust fund, in trust for certain specified *cestuis que trust*, and pay the residue of the trust moneys and deliver said furniture to F. By her will dated ten years after said settlement H. confirmed the settlement. F. died before H. H. retained possession of the securities for the mortgage debts, and part of such debts were received by her in her lifetime, and the remainder were received by the trustees. No legal transfer of said shares was made to trustees by H. *Held*, that the will perfected the settlement as being a testamentary settlement so far as regarded the shares, but not so far as regarded the mortgage debts received by H., and that the *cestuis que trust* who predeceased the testator could not take, and their shares went to the residuary legatee under H.'s will.—*Bizzey* v. *Flight*, 3 Ch. D. 269.

3. Personal property was settled in trust for such persons as W. should during coverture appoint, and subject thereto in trust for W. for life, and in case she survived her husband (which event happened) in trust for W. absolutely after the decease of her husband. Subsequently upon the marriage of her daughter, W. covenanted that £1,000 should be paid to the trustees of her daughter's settlement upon trust for the daughter for life, and after her decease in trust for her daughter's husband for life, with certain further trusts for children. W. by her will, which was expressed to be made in exercise of her above-mentioned power of appointment, bequeathed £1,000 upon trusts similar to those of the sum settled upon her daughter omitting the husband's life-interest. *Held*, that said personal property settled on the above trusts for W. was bound by her general engagements, and therefore by her covenant upon the marriage of her daughter; but that said bequest of £1,000 amounted to a satisfaction of said covenant.

W. received after her husband's death certain dividends, and railway stock, which she had purchased from the proceeds of a portion of said personal property. *Held*, that said dividends and stock did not pass under a bequest of residuary estate in W.'s said will.—*Mayd* v. *Field*, 3 Ch. D. 587.

4. A fund was settled on trustees upon trust to pay the income to A. for life, and after her death to her husband B. for life, and after the death of A. and B. upon trust to transfer the principal sum together with all dividends and interest which might be then due thereon unto and amongst all the children of A. and the issue of such children, in equal proportions, to be paid or transferred to such children as should be sons, at the age of twenty-one years, and to such children as should be daughters, at the age of twenty-one years or day of marriage whichever should first happen, the issue of any child whose parent should die before his or her share should become payable to be entitled to the share which his or her parent would have been entitled to if living. A. died leaving two children who had attained twenty-one, and a grandchild, the plaintiff, who was the son of a deceased child of A., who had attained twenty-one in A.'s lifetime. *Held*, that the plaintiff was entitled to one-third of said fund.—*Day* v. *Radcliffe*, 3 Ch. D. 654.

5. Upon the marriage settlement of A. and B. they covenanted that any real or personal estate to which A. (the wife) then was, or during the coverture should become, entitled, should be settled upon the trusts of the settlement. At the date of the settlement A. was entitled upon her death without issue to one moiety of a trust fund subject to a life-estate of B. *Held*, that A.'s contingent reversionary interest in said trust fund was bound by said covenant and did not pass to B., her husband.—*Cornwell* v. *Keith*, 4 Ch. D. 767.

6. P. being free from debts and liabilities settled, in 1858, £1,000 in trust to pay the income to himself until he should assign, charge, or otherwise dispose of the same by anticipation, or until he should be found or declared a bankrupt, and then upon trust to pay the income to his wife for life; remainder upon trusts for children with ultimate remainder in P. In 1873, P. entered into business, and in 1875 was adjudged a bankrupt. *Held*, that said settlement was void *in toto* as against creditors.—*In re Pearson. Ex parte Stephens*, 3 Ch. D. 807.

7. Real estate was devised to a woman with an expression of wish that in case the woman should marry, she should before marrying settle the estate for her own use for life, and to such uses as she should by will, and notwithstanding coverture, appoint. The woman married and had a child, and subsequently joined with her husband in a deed purporting to be in execution of said wish, whereby said estate was settled upon certain trusts for the wife, her husband, and their children. Subsequently the husband and wife mortgaged the estate without informing the mortgagee of the settlement. *Held*, that the settlement was for good consideration and was not void against the mortgagee under 27 Eliz. c. 4.—*Teasdale* v. *Braithwaite*, 4 Ch. D. 85.

See Appointment.

Shareholder.—*See* Partnership; Wills, 2.

Ship.—*See* Insurance, 3; Mortgage, 2.

Solicitor's Lien.—*See* Lien, 1.

Specific Appropriation.—*See* Bills and Notes, 1; Estoppel.

Specific Bequest.—*See* Legacy, 3, 5.

Specific Performance.—*See* Covenant; Vendor and Purchaser, 1.

Statute.

By statute any person who should "wilfully throw" rubbish into certain rivers, or "any drains, trenches, or watercourses thereunto belonging," was subjected to a fine. A tanner discharged his rubbish at a distance of four miles from one of said rivers, into a small natural stream which ran into such river. *Held*, that said "drains, trenches, or watercourses," comprised only artificial watercourses made by man; and that refuse thrown into the stream by the tanner in the course of his trade was not thrown in "wilfully" within the meaning of the statute; and that the tanner was not therefore subject to a fine.—*Smith* v. *Barnham*, 1 Ex. D. 419.

See Hotel-Keeper; Limitations, Statute of; Trade-Mark, 2.

Statute of Frauds.—*See* Fixtures; Frauds, Statute of; Vendor and Purchaser, 2.

Statute of Limitations.—*See* Limitations, Statute of.

Digest of the English Law Reports.

Stock Exchange.—*See* Negotiable Instrument.

Surety.—*See* Principal and Surety.

Tenant for Life.—*See* Devise, 3; Lease.

Tenement.—*See* Rent-Charge.

Title.—*See* Partition.

Trade-Mark.

1. H., a cigar-dealer in London, had a correspondent G. in Havannah, of whom he bought cigars H. employed an artist to design a label having a picture and motto upon it, and H. registered the label at Stationers' Hall. H. then wrote to G. requesting him to put this label upon the boxes of cigars he consigned to H., which G. accordingly did, adding the words "G., manufacturer of cigars, Havannah." G. subsequently sent boxes of cigars with said label upon them to his agents in England, and H. prayed an injunction restraining said agents from selling cigars with said label affixed. Injunction refused. There was no contract by G. that he would furnish any cigars to H., or that he would not furnish any cigars with said label to any one other than H.; and, as H. did not allege that he had any stock of said cigars on hand, it did not appear that he would be injured by G.'s selling cigars with said label to others. Moreover the label represented that said cigars were manufactured by G., as in fact they were; so that the public was not deceived nor H. injured.—*Hirsch* v. *Jonas*, 3 Ch. D. 584.

2. A word or combination of letters is not "a distinctive device, mark, or heading," within the Trade-Marks Registration Act, 1875, and cannot be registered as a trade-mark.—*Ex parte Stephens*, 3 Ch. D. 659.

Trader.—*See* Hotel-Keeper.

Trust.

1. A testator bequeathed £12,000 to two trustees upon trust to invest the whole, or such part as they thought proper, in the purchase of an advowson; and until J., the testator's son, should be presented to some benefice which should produce an annual income of £1,000 at least, or should die, upon trust to present some fit person to the benefice of which they should have purchased said advowson, and subject as aforesaid to hold said advowson in trust for J. and his heirs. And until said trustees made said investment, they were directed to invest and accumulate said sum for a period of twenty-one years from the testator's death, after which the income of said sum and its accumulations was to belong to J. And in case J. should die or be presented to a benefice as aforesaid before said trustees had purchased said advowson, said sum and its accumulations were to belong to J., his executors and administrators. Twelve years after the testator's death the trustees held said sum and its accumulations and had purchased no benefice. J. claimed to be entitled to the entire fund on the ground that he was the exclusive object of the trust. *Held*, that J. was not absolutely entitled to said fund.—*Gott* v. *Nairne*, 3 Ch. D. 278.

2. A trustee who had a life-interest in the trust estate committed breaches of trust by selling portions of the estate and applying the proceeds to his own uses, and subsequently went into bankruptcy. *Held*, that trustee's estate for life could not be appropriated to repairing the loss occasioned by said breach of trust as against the assignee in bankruptcy, who would take the trustee's legal estate as assets of the bankrupt.—*Fox* v. *Buckley*, 3 Ch. D. 508.

3. A testator, who held a trust fund secured by mortgage, devised his real and personal estate to his wife and her executors, administrators, and assigns, upon trust to leave the same in existing investments, or to sell and convert into money, and out of the proceeds to pay his debts and funeral expenses and certain legacies, and retain the income of the residue during her life; and subject as aforesaid, the remainder in trust for C. There was no express devise of trust estates. *Held*, that the mortgaged trust estate did not pass under the will.—*In re Smith's Estate*, 4 Ch. D. 70.

See Annuity, 3; Contingent Remainder; Lease; Legacy, 4; Priority, 3; Settlement, 4.

Vendor and Purchaser.

1. The plaintiff agreed to sell, and the defendant to purchase, certain freeholds and leaseholds, and by the terms of the agreement the defendant was not to investigate or make any objection in respect of the title to said freeholds prior to the year 1841. It was discovered before completion of the agreement that the defendant owned said freeholds subject to a leasehold interest in the plaintiff, and that part of the leaseholds belonged to the plaintiff in fee. The plaintiff filed a bill for specific performance of said agreement. *Held*, that said condition did not preclude the defendant from refusing to complete said agreement, as the parties had contracted under a mutual mistake as to their respective rights.—*Jones* v. *Clifford*, 3 Ch. D. 779.

2. D. agreed to purchase certain property specified in a written contract which did not contain any plan of the property; and at the same time D. signed a memorandum writtten on the back of a plan, as follows: "Plan of property sold to and purchased by D., 23d Oct., 1874. N. B.—The property included in the purchase is edged with red colour." *Held*, that said memorandum was sufficient to incorporate the plan in the contract, and that the description in the contract was controlled by the plan.—*Neue Valley Drainage Commissioners* v. *Duncley*, 4 Ch. D. 1.

See Bills and Notes, 1; Covenant; Partition.

Vested Remainder.—*See* Remainder, 2.

Vis Major.—*See* Act of God.

Water.—*See* Act of God.

Watercourse.—*See* Statute.

Will.

1. A testator executed a will and subsequently a codicil in duplicate, but the codicils bore different dates. One copy of the will and codicil was left by the testator at his banker's, and one copy he retained. Probate was granted of both wills and codicils, described as duplicates. *Held*, that evidence was admissible to show that the two codicils were not two distinct instruments, so as to give the legatee therein named cumulative legacies.—*Hubbard* v. *Alexander*, 3 Ch. D. 738.

2. A testator owning certain shares in different companies declared that the calls, if any, which might be or become due in respect of any shares constituting part of his personal estate, should be paid by the trustees of his will, out of the income and not out of the principal of his estate. The testator owned shares upon which calls were at the time of his death due, though not payable. *Held*, that such calls must be paid

from income. After the testator's death new shares in a company were allotted to and accepted by the executors in respect of shares owned by the testator in such company. *Held*, that calls upon such shares were payable out of the principal.—*Bevan* v. *Waterhouse*, 3 Ch. D. 752.

See Annuity, 1, 2; Appointment, 1, 3, 4; Charity; Contingent Remainder; Devise; Election; Illegitimate Children; Legacy; Perpetuity; Priority, 2; Remainder; Settlement, 2, 3; Trust, 3.

Words.

"*Device, mark, or heading.*"—*See* Trade-Mark.

"*Drains, trenches, or watercourses.*"—*See* Statute.

"*Family.*"—*See* Legacy, 6.

"*Foreign Bonds.*"—*See* Legacy, 10.

"*Free land or tenant.*—*See* Rent-Charge.

"*Hotel-keeper.*"—*See* Hotel-Keeper.

"*Meeting.*"—*See* Company.

"*Payable.*"—*See* Settlement, 4.

"*Wilfully.*"—*See* Statute.

REVIEWS.

Principles of the Criminal Law. By Seymour F. Harris, B. C. L., M. A., (Oxon) Barrister-at-Law of the Inner-Temple, &c. London: Stevens and Haynes, law publishers, Bell-yard, Temple Bar. 1877.

This volume is stated to contain a concise exposition of the nature of crime, the various offences punishable by English law, the Law of Criminal Procedure and the Law of Summary Convictions, with a table of offences, punishments, &c.

The author seems to think an explanation of the appearance of a new work on the Criminal Law necessary. This explanation is the want of a manual "which neither confines itself to the historical and philosophical view of the matter, nor descends into the minute particulars of the practice of the law." We think Mr. Harris is right in this respect, and his book will be found of much use to those who desire an easy and comprehensive introduction to this most important subject. It will, therefore, be welcomed by students, by practitioners in other branches of the law, and by the general reader. As a work of reference, however, to the criminal lawyer, or as a philosophical discussion of the subject it lays no claim, and it will not supply the place of such works as those of Russell, Roscoe, or Sir James Stephen.

A striking feature in the volume is the great clearness with which the subjects discussed are stated, as well as to the mode of their arrangement and subdivision, as to the language used. In a work of this kind this is essential. We can safely recommend the book before us to those for whom it is specially intended, and we should anticipate for it a ready sale.

Brice on the Doctrine of Ultra Vires. 2nd edition. London: Stevens & Haynes; Toronto: R. Carswell. 1877.

We are glad to see that a second edition of this very valuable work has been issued. There are an immense number of corporations at present in existence, and new ones are being continually formed for almost every object under the sun. This renders some knowledge of the extent of their powers a matter of necessity to every lawyer. Although only three years have passed since the first edition appeared, this book has already become the recognized text book upon the subject of which it treats. In the present edition the numerous cases which have been decided in England during the last three years have been incorporated, together with a large number of American, and we are pleased to see Canadian cases also. We are thus given a complete treatise upon the existing law as to the extent of the powers of corporations, and a digest of the cases upon the subject. It is unnecessary to discuss this work at greater length. It has now an established reputation, and has become a necessary part of any law library with any pretensions to completeness.

Banning on the Statute Law of the Limitation of Actions. London: Stevens & Haynes; Toronto: R. Carswell. 1877.

We have here a neat text book of some three hundred pages, divided into thirty-three chapters, and covering the whole of the law of limitations. The book is well arranged and carefully written. The cases upon the subject are referred to very fully. As the statutes in force in England and Ontario are very nearly the

same, the work will be as valuable here as in England, and we have no doubt will find a ready sale. It will be additionally acceptable in view of the recent important changes in the law on this subject.

BOOKS RECEIVED.

The Insolvent Act of 1875, and Amending Acts. Annotated by S. R. Clarke, Esq., Barrister, etc. Toronto: R. Carswell.

Commentaries on the Liberty of the Subject and Security of the Person. By James Paterson, Esq., M.A., Barrister, etc. London, England: Macmillan & Co.; Toronto: R. Carswell.

International Review. May–June and July–August. A. S. Barnes & Co.: New York and Boston.

British Quarterlies, Reviews & Blackwood. Leonard Scott Publishing Company, New York.

The contents of June *Blackwood* are as follows: A Woman Hater, part xiii; Sundry Short Poems, by J R. S.; Twenty Years of African Travel; Pauline, part v; How I Caught my First Salmon: A Canadian Sketch; Lord Derby's Despatch and the Debate; The Storm in the East.

CHANCERY AUTUMN CIRCUITS.

THE HON. VICE-CHANCELLOR BLAKE.

Toronto	Tuesday	Nov. 6th.

THE HON. THE CHANCELLOR.

HOME CIRCUIT.

Barrie	Tuesday	Oct. 16th.
Owen Sound	Tuesday	Oct. 23rd.
St. Catharines	Friday	Oct. 26th.
Hamilton	Tuesday	Oct. 30th.
Brandford	Thursday	Nov. 8th.
Simcoe	Wednesday	Nov. 14th.
Guelph	Tuesday	Nov. 20th.
Whitby	Thursday	Nov. 29th.

THE HON. VICE-CHANCELLOR BLAKE.

WESTERN CIRCUIT.

Stratford	Tuesday	Sept. 11th.
Goderich	Tuesday	Sept. 18th.
Sarnia	Tuesday	Sept. 25th.
Sandwich	Thursday	Sept. 27th.
Chatham	Tuesday	Oct. 2nd.
Woodstock	Friday	Oct. 5th
Walkerton	Wednesday	Oct. 10th.
London	Tuesday	Oct. 16th.

THE HON VICE-CHANCELLOR PROUDFOOT

EASTERN CIRCUIT.

Lindsay	Tuesday	Sept. 18th.
Peterborough	Friday	Sept. 21st.
Cobourg	Tuesday	Sept. 25th.
Belleville	Tuesday	Oct. 2nd.
Kingston	Friday	Oct. 12th.
Ottawa	Wednesday	Oct. 17th.
Brockville	Wednesday	Oct. 24th.
Cornwall	Monday	Oct. 29th.

AUTUMN ASSIZES, 1877.

EASTERN CIRCUIT.

THE HON. MR. JUSTICE BURTON.

L'Orignal	Monday	Oct. 1st.
Ottawa	Friday	Oct. 5th.
Pembroke	Wednesday	Oct. 17th.
Perth	Wednesday	Oct. 24th.
Cornwall	Wednesday	Nov. 7th.

MIDLAND CIRCUIT.

THE HON. MR. JUSTICE MOSS.

Napanee	Monday	Oct. 1st.
Picton	Friday	Oct. 5th.
Belleville	Tuesday	Oct. 9th.
Kingston	Wednesday	Oct. 24th.
Brockville	Tuesday	Nov. 6th.

VICTORIA CIRCUIT.

THE HON. THE CHIEF JUSTICE OF THE COMMON PLEAS.

Whitby	Monday	Sept. 17th.
Lindsay	Monday	Sept. 24th.
Peterborough	Thursday	Oct. 4th.
Brampton	Wednesday	Oct. 10th.
Cobourg	Wednesday	Oct. 17th.

BROCK CIRCUIT.

THE HON. MR. JUSTICE PATTERSON.

Goderich	Tuesday	Oct. 2nd.
Owen Sound	Monday	Oct. 8th.
Woodstock	Monday	Oct. 15th.
Walkerton	Monday	Oct. 22nd.
Stratford	Monday	Oct. 29th.

NIAGARA CIRCUIT.

THE HON. MR. JUSTICE GALT.

Milton	Tuesday	Sept 18th.
Hamilton	Tuesday	Sept. 25th.
Welland	Tuesday	Oct. 23rd.
Cayuga	Tuesday	Oct. 30th.
St. Catharines	Tuesday	Nov. 6th.

WATERLOO CIRCUIT.

THE HON. MR. JUSTICE MORRISON

Barrie	Monday	Sept. 10th.
Berlin	Monday	Sept. 24th.
Simcoe	Tuesday	Oct. 2nd.
Brampton	Monday	Oct. 8th.
Guelph	Monday	Oct. 22nd.

WESTERN CIRCUIT

THE HON. THE CHIEF JUSTICE OF ONTARIO.

London	Tuesday	Sept. 4th.
St. Thomas	Tuesday	Sept. 18th.
Chatham	Tuesday	Sept. 25th.
Sarnia	Tuesday	Oct. 2nd.
Sandwich	Tuesday	Oct. 9th

HOME CIRCUIT.

THE HON. MR JUSTICE GWYNNE.

Toronto, Tuesday, 2nd October (Nisi Prius.)

Toronto, Wednesday, 24th October (Oyer and Terminer).

FLOTSAM AND JETSAM.

The following is said to be a true copy of a will, which was submitted to a lawyer in Indiana lately :

Indianapolis, October 15th, 1867.

This certifies that Thomas Shannessey has made his last will to his wife, Catherine Shannessey, to dispose of said property as she thinks fit, if necessary to compel her to do so.

Thomas Shannessey,
X.
Witness Dennis O'Connell,
Michael Callahan.

Great Seals.—The Nova Scotians are by no means the first people who have been in trouble about a Great Seal. When the Prince of Orange, in 1688-9, took the reins of government in England, there was no Great Seal. It was part of his Catholic Majesty's luggage when he left Whitehall ; but James did not keep it for many minutes. With the impression on his mind that the government of the kingdom could not be carried on without it, he dropped it into the Thames with his royal hand. About a century later, when Lord Thurlow was High Chancellor, his house in Great Ormond-street was broken into on the 24th March, 1784, and the Great Seal of England was among the property stolen. It was never got back from the thieves, but was replaced the next day by a new one. Later, William IV. was very angry with Lord Brougham for taking the Great Seal to foreign parts in his valise. A young lady once made it her pleasure to obtain the Seal from the gallant old lawyer, and compelled him to go down on his knees to her on a rather public occasion, before she would restore it to his custody.—*Ex.*

Robes.—More confusion has arisen from the supposed operation of the Judicature Act. On the Queen's birthday—or, rather, on the day specially appointed for the celebration of Her Majesty's birth—judges and counsel were at cross purposes concerning their robes. Some judges wore the splendid scarlet and full-bottomed wigs ; others black gowns and ordinary wigs. Some Queen's counsel affected big wigs, and some little wigs. There are days in the Calendar which sorely puzzle the authorities at Oxford and Cambridge, leaving dons and scholars in doubt whether surplices or gowns should be worn in chapel. Society also occasionally presents problems in costume, not easily solved. But lawyers are supposed to rise above all difficulties ; and judges are expected to know in what robes they are to expound the law, as clearly and certainly as they are 'on assumption' able to declare the law itself. Judges often complain that they do not know from one day to another where they are to sit, and what business they are to do. This is very deplorable ; but not so bad as doubt and discrepancy as to the dress in which justice is to clothe her preachers.—*Ex.*

A Correspondent of the Albany Law Journal, writing from London on "The Crime of Murder in England," reaches the following conclusions : (1.) That the sensational manner in which crimes of violence are reported in American newspapers has impressed foreigners, and especially the English, with the idea that lawlessness prevails throughout every grade of American society, and that no man's life is safe even in the streets of New York, unless he can defend it himself in any chance quarrel or contact with any bloodthirsty desperado, with a whole arsenal of pistols and knives. (2.) That for every man killed in the heat of affray in America, some man, woman or child is murdered in England barbarously, deliberately in cold blood. (3.) That in England the man who commits a murder is "past praying for," whenever the evidence is conclusive that he did kill. If A kills B to-day, a coroner's jury renders its verdict to-morrow. A is examined before a magistrate and committed the same or next day, tried next week, and hanged three weeks hence, within the walls of the county jail, unknown, unrecognized, unapplauded ; and a brief paragraph in the newspapers announces when, how and why he paid penalty to the law, and that is the last of him. (4.) That in England there are no long delays, and frequent postponements, and new trials, and reprieves, and public demonstrations of sympathy, and speeches upon the scaffold, and departures with great *eclat*, surrounded by an admiring staff of newspaper reporters, and celebrated, to the slightest detail, in columns of tumid newspaper sensationalism. (5.) That England punishes her murderers with certainty and fitting circumstance, while we either let them go free or waft them from the gallows to the clouds amid the pæans of admiring friends. (6.) That the English method of treating murderers is greatly superior to the American, with its delay, uncertainty, and, at the end, senseless and demoralizing publicity. If people must be killed, let it be done quietly, sadly, solemnly, as becomes the terrible example sought to be conveyed, and the great responsibility assumed.—*Ex.*

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Hilary Term, 40th Victoria.

DURING this Term, the following gentlemen were called to the Bar; the names are given in the order of merit.

Albert Clements Killan.
Thomas Hodgkin.
Cornelius J. O'Neil.
Francis Beverley Robertson.
Henry Ernest Henderson.
Hamilton Cassels.
Francis Love.
William Wyld.
Thomas Caswell.

The following gentlemen were called to the Bar under the rules for special cases framed under 39 Victoria, Chap. 3.

George Edmonson.
Frederick W. Colquhoun.
Edward O'Connor.
John Bergin.

The following gentlemen received Certificates of Fitness:

J. H. Madden.
H. Cassels.
J. W. Gordon.
J. Dowdall.
C. J. O'Neil.
T. M. Carthew.
T. J. Decatur.
T. D. Cowper.
A. W. Kirkman.
C. McK. Morrison.
C. Gordon.
F. S. O'Connor.
G. S. Hallen.

And the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:

Graduates.

Charles Augustus Kingston.
John Henry Long.
James J. Craig.
William Fletcher.
Leonard Harstone.
Patrick Anderson Macdonald.

Junior Class.

Benjamin Franklin Justin.
John F. Quinlan.
John Williams.
Joseph William MacDowell.
Phillip Henry Dratton.
Thomas A. Gorham.
James R. Brown.
George J. Sherry.
Hector McKay.
D. Henderson.
Alexander Carpenter Beazeley.
John Bertram Humphries.
Lauren G. Drew.
Herman Joseph Eberts.
Solomon George McGill.
David Johnson Lynch.
Thomas Henry Loscombe.
John Vashon May.
George Moir.
J. H. Macallum.
Hugo Schliefer.
David Robertson.
Angus McB. McKay.
Charles Rankin Gould.
William James Cooper.
Edward Stewart Tisdale.
Francis Melville Wakefield.
Alexander Stewart.
Thomas Miller White.
John Arthur Mowat.
Henry Bogart Dean.
George Robert Knight.
Humphrey Albert L. White.
John Wood.
George Benjamin Douglas
Alexander Humphrey Macadam
Hugh Boulton Morphy.
William Henry Brouse.
George J. Gibb.
Frederick E. Redick.
William Masson.
Edward Guss Porter.
Thomas Robert Foy.
Henry Albert Rowe.
Thomas H. Stinson.
Stewart Masson.
Francis Evans Curtis.
William Stubbs.
Robert Taylor.
Henry M. East
Armour William Ford

Wm. Martin McDermott.
Charles W. Phillips.
Wellington Small.
John Clyde Grant.
George Merrick Sinclair.
George Walker Marsh.
Edward Albert Foster.
Frank Russell Waddell.
Francis P. Conway.
Henry Dexter.
William T. Easton.
Albert Edward Wilkes.
James Lane.
John Henry Cooke.
Alexander Howden.
Douglas Buchanan.
John Alexander Stewart.
Arthur Mowat.
John McLean.
Robert Cockburn Hays.
William Aird Adair.
Ernest Wilbert Sexsmith.
John Baldwin Hand.
James Barrie.
George Frederick Jelfs.

Articled Clerks.

Noble A. Bartlett
Owen M. Jones.
Eugene Maurice Cole.
Ernest Arthur Hill Langtry.
John Oberlin Edwards.
J. A. Loughead.

Ordered, That the division of candidates for admission on the Books of the Society into three classe be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission as Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects:—

CLASSICS.

Xenophon Anabasis, B. I.; Homer, Iliad, B. I. Cicero, for the Manilian Law; Ovid, Fasti, B. I., vv. 1 300; Virgil, Æneid, B. II., vv. 1-317; Translations from English into Latin; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of quadratic equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; An examination upon "The Lady of the Lake," with special reference to Cantos v. and vi.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar. Translation of simple sentences into French prose. Corneille, Horace, Acts I. and II.

or GERMAN.

A paper on Grammar. Musaeus, Stumme Liebe Schiller, Lied von der Glocke.

Candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), are required to pass a satisfactory examination in the following subjects:—

Ovid, Fasti, B. I., vv. 1-300,—or
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

A Student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk, (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

All examinations of Students-at-Law or Articled Clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

THOMAS HODGINS, *Chairman.*

Osgoode Hall, Trinity Term, 1876.

Adopted by the Benchers in Convocation August 29, 1876.

DIARY FOR AUGUST.

1. Wed..Abolition of slavery in British Empire, 1834.
5. SUN..10*th Sunday after Trinity.*
12. SUN..11*th Sunday after Trinity.* Disraeli made a peer, 1876.
13. Mon..Sir Peregrine Maitland, Lieut.-Governor, '18.
14. Tues..Law Society Primary examination.
17. Fri....General Hunter, Lieut.-Governor.
19. SUN..12*th Sunday after Trinity.*
21. Tues..Long vacation ends. First intermediate examination.
22. Wed..Second intermediate examination.
23. Thur..Attorneys examination.
24. Fri....Examination for call.
25. Sat....Examination for call with honour.
26. SUN..13*th Sunday after Trinity.*
27. Mon..Trinity term. Law Society Convocation meets
28. Tues..Law Society Convocation meets.
30. Rehearing term in Chancery.

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THE
Canada Law Journal.

Toronto, August, 1877.

It is only under very peculiar circumstances, and when public interests require it that the lay press should bring before the public for discussion the conduct of the Judges of the land. It was therefore with much regret that we read recently some uncalled for observations in a daily newspaper published in Toronto, alleging a breach of one of the provisions of the Dunkin Act, by a learned Vice-Chancellor. It is almost needless to say that the information on which the articles were founded did not shew that there had been any infraction of the law. The learned and hospitable Judge is not therefore in any way called upon to take any notice of the matter, even should he under any circumstances think proper to answer the charge. We only now allude to it to protest against the too common practice of dragging the judiciary before the public to try and make some point in some disputed question of political or public interest, thereby doing an immense harm to all and good to none.

CURIOSITIES AND LAW OF WILLS.

(*Continued from page* 186.)

Some judges, however, think that any stipulation in restraint of marriage is an unwarrantable interference with personal liberty. Hear what one in Pennsylvania says, "the principle of reproduction stands next in importance to its elder-born co-relative, self-preservation, and is equally a fundamental law of existence. Not man alone, but the whole animal and vegetable kingdoms, are under an imperious necessity to obey its mandates; from the lord of the

forest to the monster of the deep, from the subtlety of the serpent to the innocency of the dove, from the celastic embrace of the mountain kalmia to the descending fructification of the lily of the plain; all nature bows submissively to this primeval law; even the flowers which perfume the air with their fragrance, and decorate the forests and fields with their hues are but curtains to the nuptial bed. The principles of morality, the policy of the nation, the doctrines of the common law, the law of nature and the law of God unite in condemning it, and the condition attempted to be imposed by this testator upon his widow :" *Commonwealth* v. *Stauffer*, 10 Penn. 350.

Mr. James Robbins and Mr. Edward Concanen, both of whom died in London in the last decade, held very opposite views as to the proper dress for their widows; the former by his will directed "that in the event of my dear wife not complying with my request to wear a widows' cap after my decease, and in the event of her marrying again, that then, and in both cases, the annuity payable to her shall be £20 per annum and not £30." Mr. Concanen on the other hand, says, "And I do hereby bind my wife that she do not after my decease offend artistic taste, or blazon the sacred feelings of her most sweet and gentle nature by the exhibition of a widows' cap."

A legatee in New York, and some of the other states, has the happiness of being able to demand payment of his legacy before the expiration of the year upon giving the executors a bond with two securities to refund in case of deficiency.

An interesting account is given of a bequest made in 1736 by one Henry Ranie, a London brewer, to provide for the marriage of poor maids; through its instrumentality some three hundred girls have received marriage portions. Commodore Uriah P. Levy, who left a large estate, real and personal to the people of the U. S., or such persons as Congress should appoint to receive it, in trust for for the establishment and support of an agricultural school, directed by his will "that no professorships be established in said school, or professors employed in the institution, for in proportion to the smallness of the number of the teachers so will industry prevail." The courts, however, held that the people of the United States could not take as trustees, that such indefinite trusts were invalid, and that the English law on such points was not the law of the State of New York (34 N. Y. 584). Strange as it may appear the judicary of New York seems unwilling to allow the commonwealth to obtain any of these rich prizes, for lately when a man made a demise "to the Government of the United States, at Washington, for the purpose of assisting to discharge the debt contracted by the war for the subjugation of the rebellious Confederate States," the judges frustrated the patriotic intention by declaring that the the government had no power to take: *People* v. *Fox*, 52 N. Y. 530. Mr. Proffat, however, tells us that the law as decided in New York is not in harmony with the decisions in a large majority of States.

The particulars of the celebrated Thelusson devise are recounted. It was calculated at the time, that when the day came for the division of this fund there would be an income of nearly two millions sterling; the information that the expenses of management for seventeen years exceeded $613,500 leads us to wish devoutly that we had been and still were the solicitors and managers of the estate. We are surprised to see it asserted that when the name of a child is omitted in a will the law presumes that the name of that child has been overlooked by the testator, and the court exercising its equit-

able powers, interferes on behalf of the child to see that it gets its due share of the property; but where the intention is expressed, and much more when a reason is given for cutting off a child, the courts cannot interfere on its behalf, unless on some imputation of insanity or undue influence. We wish our author had given us some authority for this statement. If he had had an opportunity of reading the case of *Sugden* v. *Lord St. Leonards* L. R. 1 P. D. 154, Mr. Proffatt probably would not have said that the English courts do not admit lost wills to probate (p. 161) as the Americans universally do.

Under the head of "Revocation of Wills," there is a decided case given to the effect that a will is not revoked by its being gnawed to pieces by rats, the fragments being pieced together afterwards *Etheringham* v. *Etheringham*, Aleyn 2.) Where a sick man in bed asked for his will that he might destroy it, and an old letter was handed to him which he tore up, supposing it to be the will, it was held that this was a good revocation: *Pryor* v. *Coggin*, 17 Ga. 444. *Smiley* v. *Gambell*, 2 Head. 164.

The way in which wills are affected by the domicile of the testator was most carefully discussed in the interesting case of he will of Koscius, the celebrated Polish General. "Warsaw's last champion," at whose fall "Freedom shrieked," and "Hope, for a season, bade the world farewell" was possessed of a considerable sum of money in the United States, the arrearages of his pay as an officer of the army during the Revolution. Although the gallant patriot left four wills it was held that as to his American property he died intestate, and that the same should be distributed according to the law of France, where Koscius was domiciled at the time of his death: *Ennis* v. *Smith*, 14 Hon. 400.

The concluding chapter "on the construction of wills" reminds one too strongly of Jarman's disquisitions to make the consideration of it very delightful work during the long vacation, although if we had to ponder the question at all we would greatly prefer peering into the pages under review to wading through those of Jarman or Theobald.

We close the book with feelings of gratitude to the author who has enabled us to refresh our memory so easily and pleasantly; with a faint pang of regret that all our examinations are over, (this would be such a delightful book to get up); and with the idea that students will find it a useful primer from which to obtain their first ideas on this important branch of the law, and practitioners in Canada, an equally useful book because of the numerous American decisions cited and remarked upon, and the old English acquaintances so pleasantly recalled to mind. We trust that Mr. Proffatt will soon take up his pen again; one who can thus rapidly combine the *utile et dulce* should not be allowed to remain idle.

LORD ABINGER AND THE NORTHERN CIRCUIT.

Under this heading the July number of *Blackwood* treats us to a most interesting sketch of the life of this well-known Chief Baron, better known to the public, as Sir James Scarlett. Want of space forbids our republishing the article in full. Those who wish to spend a half-hour in vacation time, cannot do better than read it in full in the pages of that prince of magazines, that now lies before us.

Scarlett was, as is well-known, one of the most, if not the most successful advocate that ever addressed a British jury. And one of the funniest evidences of this fact, if not the most conclusive, is the following anecdote of a Lancashire labourer, who had frequently witnessed the forensic contests at the

assizes between Scarlett and Brougham. He said, "I think nowt o' that chap Scarlett, for he has always got the right and easiest case; but Brougham is the man for me, for he has always a wrong case and fights it like a man."

Lord Brougham was for years his principal opponent on circuit, and it was to these two leaders that Mr. Warren was indebted for the characters of Mr. Quicksilver and Mr. Subtle in his famous novel of "Ten Thousand a Year;" Brougham being the former, and Scarlett the latter. We cannot, however, reproduce all the good things in this sketch, and must content ourselves with republishing that portion which "unfolds some of the hidden mysteries of circuit life, and lift the vail that shrouds the jovial doings of the Grand Court;" which is thus referred to by Lord Abinger himself in his autobiography: "On the Northern Circuit at certain periods there used to be a grand supper, at which all the members were assembled, and the expenses of which were paid by fines and congratulations that resulted in contributions to which the principal leaders were subject. These were introduced in general in a ceremonious speech by one of the body, who bore the office of Attorney-General of the Circuit."

The writer of the article in *Blackwood*, who seems to have been on the same Circuit, and personally familiar with most of the incidents referred to in connection with the professional career of Lord Abinger, thus proceeds:

"On one occasion when the late Chief Justice Tindall was Attorney-General, he presented the name of Mr. Scarlett for congratulation (that is a fine) as the inventor of a machine that had the effect of making the judges head move in a direction angular to the horizon, which signified a nod of approbation. But there was another leader of the circuit, whom Lord Abinger does not name, but says that he "was a gentleman of more popular and of much higher reputation than myself"—meaning of course Brougham—who was also present, as the inventor of a rival machine to operate upon the head of the judge; but it had the effect of producing a motion parallel to the horizon—that is, of signifying dissent. This is not a bad counterpart of the story we have already told of the Lancashire rustic. On another occasion, after Scarlett had left the circuit, Pollock, who was the leader, was crowned with an empty punch-bowl. In fact there was hardly any limit to the fun and nonsense that ran riot at the Grand Court. And it was treason to the circuit to absent one's self from it. If any members had not joined it at the assize town, their names were called three times—each time with some ludicrous prefix, which was supposed to hit off the foible or foibles of the man and—stinging truths were often told in the selection of the epithets. We know no occas- when the lines of Burns were more strictly applicable—

"If there's a hole in a' your coats,
I rede ye tent it;
A chiel's amang ye takin' notes,
And, faith, he'll prent it!"

But no excuse but that of positive illness was allowed to prevail. If the absent barrister was in the circuit town, he was sent for by the officers of the court, who were sworn to do their duty on a bottle of port wine, and he was fetched *nolens volens* into court. Once a friend of ours had quietly slipped away, to attend, we believe, a marriage on the following day; but he was pursued by Hildyard, late M. P. for Whitehaven, and another—we think it was Cresswell—who were the messengers at the time, and being found at an inn in the neighborhood of York, he was literally handcuffed, and brought in that state to the circuit mess. All this was borne with perfect good-humour. The only thing with which we can compare these saturnalia of the bar—

"Si parva licet componere magnis"—

are the proceedings of the Abbot of Unreason, as described by Sir Walter Scott in one of his novels, when the motly crowd that followed in his train shouted ont "A Hall! a hall! for the venerable Father Howleglas, the learned monk of Misrule, and the Right Reverend Abbot of Unreason!" and we must not forget the scene in 'Guy Mannering,' where Counsellor Pleydell is represented, in the midst of his frolicsome companions, engaged in the pastime of High Jinks, "enthroned as a monarch in an elbow chair, placed on the dining-table, his scratch-wig on one side, his head crowned with a bottle-slider, his eye leering with an expression betwixt fun and the effects of wine."

We don't know whether the same practice prevailed on all the other circuits, but it certainly did and still does in some ; and records of the proceedings are carefully kept and jealously guarded by the "Attorney-General" of the year. We remember once looking at the records of the Midland Circuit, and the first entry that caught our eye was the following: "Mr. Wallace bets Sergeant So-and-so a dozen bottles of port that the words, *Audaces fortuna juvat*, are not in Virgil ;" and then comes an entry, which tells that the Sergeant lost the bet, and the wine was confiscated to the use of circuit mess.

We have been permitted to have access to the records of the Northern Circuit kept during the time that Scarlett was a member of it, and a few extracts from them may amuse our readers.

Scarlett joined the circuit at the summer assizes at York in August 1791, and filled the office of junior. This office, although held by the youngest member of the bar on circuit, confers some dignity and considerable power. The object is to initiate the last comer in all the mysteries of circuit life ; and the voice of the new-fledged barrister is as potent in determining questions of professional etiquette as that of the most smoke-dried and venerable leader. Heywood was then "Attorney-General ;" and we find that at the Grand Court held at York, Mr. Law (afterwards Lord Ellenborough) and Mr. John Cockell were indicted "for that they had wilfully and maliciously hired a mob to attend a trial of a certain cause, and applaud the speech of Mr. Law with loud noises and shoutings." Law pleaded guilty as to the hiring ; and Mr. Chambre being called as a witness, proved that Mr. Law had been offered twenty-five guineas for a copy of his speech at the said trial ; and this being thought "relevant evidence," Mr. Law was fined two gallons for the said offence. At the Lancaster summer assizes in 1797, Mr. Topping was congratulated in two gallons for his lucky "miscarriage" in throwing himself out of his gig ; and on the same occasion, Mr. Scarlett was congratulated in two bottles "for having argued a demurrer extremely well in court this morning."

At the Grand Court held at York in March 1812, the "Attorney-General" of the year produced the manuscript copy of a London Gazette which had been accidently dropped by Lord Grey, and which "ought to have been published" if Lord Grey had not lost it. It purported to contain several appointments of members of the circuit to important offices ; "but," said the Attorney-General, "Mr. Scarlett you perceive, was not included in the Gazette, and he showed the most sensible disappointment, that being his only hope of getting into business at all. So at Guildhall he proclaimed himself a junior at the bar, hoping that by his modesty some good-natured soul would give him something to do. . . . He has been canvassing with great zeal, and says that owing to his likeness to Bonaparte he doesn't now care a farthing about the bar or business, but will ship himself privately in a smuggler and go over to the Continent. He knows a secure way of taking Bonaparte off ; and as he is so like him, the French won't know the difference, and he'll have have himself proclaimed Emperor instead. I move that he be proclaimed Emperor, and congratulated accordingly." Mr. William Wypeng, however, proposed that he should be proclaimed "the Scarlet whore of Babylon," which was negatived ; and it was declared that his title should be "simply and supremely Emperor." He was then congratulated in two guineas "amid peals of applause."

At the summer assizes at Lancaster, in August 1815, Scarlet held the office of "Attorney-General," and presented for congratulation the name of James Allan Park, on account of a gallant exploit he had just performed. He had gone to Rochefort and challenged Bonaparte in single combat ; but "after much shuffling," Bonaparte declined to meet him, but consented to become his prisoner ; and Mr. Park "has returned amongst us after delivering up his prisoner to Captain Maitland, to be safely and securely kept without bail or mainprise." He moved that Mr. Park should be congratulated in two gallons. At the same Grand Court Mr. Paine was fined one gallon "for a most fulsome compliment he had paid in open court at the late assizes to an attorney ;" and Mr. James Parke (afterwards Lord Wensleydale) was also fined one bottle for the paltry offence of "puffing himself" in an article published in the 'Pilot' newspaper. A similar fine was imposed on Alderson (the well-known Baron of the Exchequer) for the like offence. Scarlett then made a short address, and craved leave to retire from public life and lay down his office of Attorney-General.

At Lancaster summer assizes in 1816, the Attorney-General of the circuit produced a copy of the 'Sunday News,' and called attention to a column headed *Multum in parvo*, which contained amongst other items the following, "Another letter on the subject of Junius. At Scackleton, near York, a goose lately produced two goslings from one egg. A steamboat has

lately crossed the English Channel and ascended the Seine to Paris. The Prince Regent now walks without the aid of a walking-stick. Mr. Scarlett had 82 briefs at Lancaster, in 78 of which he succeeded." The Attorney-General moved that the circuit should determine how many gallons, "not exceeding the number of his successful briefs," Mr. Scarlet should be fined for inserting this paragraph. Mr. Scar- pleaded in mitigation that he had derived no benefit from the artifice he had recourse to, and he was fined five gallons. But as at the present assizes at Lancaster, the 78 successful verdicts of the last assizes had already dwindled down to 50, with small prospect of any increase, Mr. Scarlett was further condoled with in four gallons. At the same Grand Court Mr. Richardson was congratulated in three gallons on his equestrian skill in contriving to throw himself from his horse and "give himself so many beautiful marks on the face."

At the York assizes in 1821, Mr. Scarlett was fined for flattering himself that he had made a good speech for Sir Francis Burdett, whereas the whole merit of the speech belonged to Mr. Blackburn, who, "by his vigour, force and energy, reduced the judges to a perfect state of nonetity. He thundered, lightened, stamped, and roared in such a manner that every one thought that the devil or the Bonassus had broken loose." Mr. Williams (afterwards a Judge of the Court of King's Bench) was condoled with in for not having a nose for snuff, in consequence of which the Corporation of London had not presented him with a box; although, by way of compensation, the electors of Preston, in pure admiration of his talents, had sent him a warming-pan. At a subsequent court, Littledale was fined for having drawn an indictment with one hundred and twenty counts, "not one of which was applicable to the case;" and a quadrille got up in which Alderson, Tindal, Sergeant Cross, and others, danced to the tune of "Fol de rol rol;" "but Alderson setting off wrong, put the rest out, and the whole was soon a scene of confusion."

We must now, however, pass on to a more distinguished name, and introduce Brougham upon the stage. It is well-known that he is the Mr. Quicksilver, and Mr. Scarlett, the Mr. Subtle, in Mr. Warren's famous novel of 'Ten Thousand a-Year,' which first appeared in the pages of The Magazine—and no name could have been more happily devised. It is unnecessary to speak of the prodigious acquirements of Brougham, which are known to everybody; but we doubt whether the public are generally aware of the extraordinary versatility of his powers. We know writings of his, which he published anonymously, full of wit and fun, but of which he has never been suspected to be the author. His greatest speeches, both at the bar and in Parliament, have been collected, and are familiar to us all; but some of his admirable addresses to juries, both on circuit and in London, have not been reported, or can only be found in out-of-the-way corners, and by considerable research.

At the York Lent assizes in March 1822, Brougham was "Solicitor-General." The "Attorney-General" was Courtenay, who brought under the notice of the Grand Court an article in the Edinburgh Magazine which thus spoke of Mr. Scarlett: "He has the manners of a finished and perfect gentleman, and the air of a man of the world. . . . His person is stately and symmetrical, and his physiognomy almost too good for a man." He proposed, therefore, that Mr. Scarlett should take off his coat and show his symmetrical form that he might be congratulated upon it.

"I come next," he said, "to my friend Mr. Brougham, who is thus puffed in the Magazine," alluding to a breach of promise of marriage case—*Thompson* v. *Blamire*—in which Brougham, had been counsel for the plaintiff, "and kept the Court in convulsions of laughter for an hour and a half. Never was poor sinner rendered so unmercifully ridiculous as Blamire, the treacherous lover of the forsaken Sarah. Judge jury, bar, ladies, gentlemen, and 'swinish multitude,' were all equally acted on by the irresistible drollery and comic humour of this wonderful man." The Attorney-General proceeded:—

"Sir, I recollect the case, and it did produce immoderate laughter, but it was at the expense of our friend's own client. He did, however, get a paltry verdict of £100. I recollect a good story about Brougham's features. He stood for Westmoreland, and by means of the grossest bribery contrived to get a few votes. The bribe was a five-guinea piece, covered with pewter, with a likeness of Brougham on it. One voter, showing his piece to a friend, the other said, 'It is not like him!' 'Oh,' says the first, 'you miss the twitch in his face, but you cannot get that in pewter.'" Mr. Brougham was then congratulated in two guineas on his "change of features."

In the record of one of the Grand Courts we find competitive translations of the line—

"Flectere si nequeo superos, Acheronta movebo"—

assigned to different leaders of the circuit. One of them, "by Mr. Brougham," is—

"The case, my lords, is closed but ponder well—
For, if you don't, I'll pitch you all to h—l."

Another "by Mr. Holt," is—

"The gods decide against me—stupid boobies!
I'll have a writ of error *coram nobis*."

A capital eclogue, written by the late John Leycester Adolphus, was read out by the Attorney-General at Liverpool in 1839. It was assumed to have been spoken by Sir Gregory Lewin and Joseph Addison, both well-known members of the circuit. The scene is the banks of Windermere, and the time sunset. We have only space for a few couplets—

ADDISON.

How sweet, fair Windermere, thy waveless coast!
'Tis like a goodly issue well engrossed.

LEWIN.

How sweet this harmony of earth and sky!
'Tis like a well concerted *alibi*.

ADDISON.

Pleas of the court are coarse and spoil one's tact,
Barren of fees and savouring of fact.

LEWIN.

Your pleas are cobwebs, narrower or wider.
That sometimes catch the fly, sometimes the spider.

ADDISON.

Thoughts much too deep for tears subdue the court,
When I *assumpsit* bring, and godlike waive the *tort*.

LEWIN.

Tell me the difference first—'tis thought immense—
Betwixt a naked lie and false pretence

ADDISON.

Change we the venue, Knight—your tones bewitch;
But too much pudding chokes, however rich.
Enough! enough! and surplusage the rest:
The sun no more "gives colour" to the west.
And one by one the pleasure-boats forsake
Yon land with water covered called a lake.
'Tis supper-time—the fun is somewhat far'
Dense are the dews, though bright the evening star,
And wightman might drop in, and eat our char.

The two swains were congratulated in one guinea each on their success in bucolic poetry.

At the grand Court at York, held in March 1849, the theme of the Attorney-General's wit was the difficulty felt by the Lord Chancellor in deciding upon the numerous claims for a silk gown made by leaders of the Northern Circuit. Some, of course, were disappointed, and amongst others, Ingham, who was said to have suddenly disappeared; and on the door of his chambers in the temple was found, written in chalk, the following epitaph:—

"The Chancellor he did me bilk;
He said, 'No!' when I asked for silk.
Enquire within for Robert Ingham,
Who lies interred in stuff and gingham."

SELECTIONS.

CURIOSITIES OF ENGLISH LAW.

RELIEF AGAINST PENALTIES AND FORFEITURES.

If Sir Samuel Romilly had lived in these days he might perhaps have modified the contemptuous opinion he held of the capacity of Lord Chancellors in the matter of Law Reform. Law Reform has of late been in the ascendant. To have "views" on that subject has now become a necessary constituent element of the complete lawyer. Even those treatises which only profess to impart the rudiments of legal knowledge to the youthful student, endeavour, with a courageous disregard of the mere exigencies of examinations, to instil some notion of the law not only as it is, but as it ought to be. We all dabble in Law Reform, from the Lord Chancellor to the Law Student. Whether even in these days the highest legal dignitaries are the most efficient law reformers is a question that may perhaps admit of doubt, but there can be no doubt whatever that Lords Westbury, Cairns, Hatherley, and Selborne, and above all, Lord Justice James, have displayed much zeal in the cause of Law Reform. There is indeed some difference of opinion as to whether the latest manifestations of judicial zeal in that direction have been altogether well considered, but no one can deny that the late sweeping enactments betoken a stirring of ideas in high places that to Lord Eldon and the worthies of fifty years ago would have seemed nothing less than portentous. While the Judicature Acts have effected a great revolution in matters of practice, the changes in substantive law have been few and comparatively unimportant. This is a somewhat anomalous state of things. Much remains to be done in the latter department of Law Reform, and the spirit of the time would seem to afford a favorable opportunity for the discussion of certain doctrines which, although established on what was once considered the firm basis of a long line of decisions, have, as we venture to think, very little except their antiquity to recommend them.

There is, perhaps, no part of our judicial system which has been more often made the subject of panegyric than the

jurisdiction assumed by Equity to relieve against penalties and forfeitures. If good intentions are the only test of desert, the heroic expedients resorted to by Equity in its endeavours to enforce fair dealing between man and man cannot be too highly praised. These expedients have, however, been attended with untoward results, and we hope to show that the Legislature would act wisely in abrogating the rule of Law, which (among other evils) in many cases hinders a person from enforcing a penalty he has bargained for on the breach of a contract. It is well known that contracts are often enforced by the sanction of a penalty disguised under the name of "liquidated damages," but (as will be shown) it is only a certain class of contracts which is in practice capable of being so enforced, and the Courts might well be constrained to forego the perplexing distinction which at present obtains between penalties and liquidated damages, and to admit the broad principle that contracts may be legally enforced by the sanction of a penalty on non-performance. It may be observed that the Legislature is in the habit of enforcing obedience to Acts of Parliament through the medium of penalties, and if a person may be called upon to pay a penalty for the commission of an act of the illegality of which he may be ignorant, it is surely no greater hardship, at all events in the absence of special circumstances, that he should be called upon to pay a penalty to which he has purported to subject himself by express contract. The decisions by which the law has been settled, when taken separately, are, it is true, sufficiently plausible, but they are not easily reconcilable. The judicial instinct has contrived, under great difficulties, to preserve a certain semblance of justice, a semblance owing its existence not to steady adherence to the dictates of an inexorable logic, but on the contrary, to the bold disregard of logic which has enabled the Judges to stop short in the middle of any syllogism threatening to lead to an inconvenient conclusion.

There is one familiar and very instructive instance of a decision that would otherwise have worked great injustice, having been rendered innocuous by means of a purely imaginary distinction, namely, the provision for enforcing punctual payment of interest on mortgages. The law on this subject is stated for the edification of Law Students by Mr. Joshua Williams, in his text-book on "Real Property," as follows:—"A curious illustration of the anxiety of the Court of Chancery to prevent any imposition being practiced by the mortgagee upon the mortgagor occurs in the following doctrine: that, if money be lent at a given rate of interest, with a stipulation that, on failure of punctual payment, such rate shall be increased, this stipulation is held to be void as too great a hardship on the mortgagor, whereas the very same effect may be effectually accomplished by other words. If the stipulation be that the higher rate shall be paid, but on punctual payment a lower rate of interest shall be accepted, such a stipulation being for the benefit of the mortgagor is valid, and will be allowed to be enforced."*

It may we think, be gathered from the above quotation that Mr. Joshua Williams does not regard this distinction with any favour, and probably respect for the Bench would not have deterred him from expressing a decided opinion on the matter had he not felt convinced that any comment would be superfluous.

We now propose to take a comprehensive view of the equitable doctrines of Relief against Penalties and Forfeitures, and in the course of the survey we shall point out some other legal "curiosities" not unworthy of comment.

Perhaps the most astonishing "curiosity" connected with this doctrine is the circumstance that first led to the interference of Equity.

One of the grounds on which Equity professes to exercise its jurisdiction (notably in the case of bonds and mortgages) rests on the assumption, which, if it were not true, would be utterly incredible, that persons are in the habit of putting their hands to documents which do not express their real intention. Equity claims to construe written agreements not according to the plain meaning of the words, but according to what it conceives ought to have been the intention of the parties. The respective parties may have declared their meaning in writing as distinctly as possible, but nevertheless Equity, in the

* Lord Northington, in *Stanhope* v. *Manners*, 2 Eden, 199, says: "I never heard or could myself discover the sense of this distinction."

exercise of its discretion, will not only declare that the parties must have meant something quite different, but will carry its declaration into effect by obliging them to act as if they had, in fact, put their hands to such an agreement as it considers they ought to have entered into. This is the Equitable doctrine with regard to mortgages. A mortgage is a document in which an agreement is purported to be entered into between mortgagor and mortgagee, which neither of them intends shall be carried into effect. In this state of things Equity steps in and says to them, "It is clear neither of you intended to enter into any such agreement as is expressed in this document; you meant to enter into quite a different agreement, and you shall be held to have executed that agreement instead of the one you did in fact execute." In the case of mortgages the assumption of Equity was no more than the truth. It is notoriously the fact that in every mortgage the parties purport to enter into an agreement different from the one they intend to be bound by, and such being the case, Equity had a good excuse for coming to the rescue. The assumption of a power to override the express provisions of written documents, and of the faculty of arriving at the real intention of contracting parties not by a perusal of their written declarations, but by the exercise of a refined instinct of justice, was, however, fraught with much danger; and the success of the experiment as to one class of contracts provided a precedent that led to serious difficulty. It is true that the Judges have from time to time, under the pressure of circumstances, given various reasons for relief against penalties; but according to Lord Macclesfield, "the true ground of relief is from the original intent of the case, where the penalty is designed only to secure money, and the Court gives him all that he expected or desired," and this view of the law, transmitted in Tudor's Leading Cases, continues to be put forward as the pretext for interference, though it has not escaped severe judicial criticism.

The absurdity of the proposition that where a person bargains for a penalty on the non-payment of a stipulated sum at a stipulated time he gets all that he expected or desired, if after an indefinite lapse of time he obtains the sum without the penalty, has been more than once forcibly exposed by Lord Eldon. In *Hill* v. *Barclay* (18 Ves. 60) he says: "The Court has certainly affected to justify that right which it has assumed to set aside the legal contracts of men, dispensing with the actual specific performance upon the notion that it places them, as near as can be, in the same situation as if the contract had been with the utmost precision specifically performed; yet the result of experience is that where a man, having contracted to sell his estate, is placed in this situation, *that he cannot know when he is to receive the price when it ought to be paid*, the very circumstance that the condition is not performed at the time stipulated may prove his ruin, notwithstanding all the Court can offer as compensation." Here Lord Eldon puts the matter in its true light; the real reason why indiscriminate relief should not be granted against penalties for the non-payment of money at a stipulated time is that by relieving against the penalty you take away all inducement to punctual payment, so that if the principle enunciated by Lord Macclesfield were to be carried out to its logical conclusion, no one would know when he could get in his debts, and all credit would be destroyed. Just as we hang a murderer, not because he has committed a murder, but in order that murders may not in future be committed, in the same way penalties should be enforced, not in order to wreak vengeance on the defaulter, but in order to deter others from making default.

Although the Chancery Judges did not entertain so great a regard for logic as to feel compelled to make it their business to see that no one was obliged to pay his debts till it should be quite convenient for him to do so, still they carried their benevolence with regard to debtors to such an inconvenient extent in decreeing relief against forfeitures of leases for non-payment of rent at any indefinite time after the rent had become payable, that the Legislature had to interfere and obviate what was acknowledged to be a palpable injustice by putting a limit to the time within which relief might be claimed. The admission that a palpable injustice had been inflicted by following out the proposition laid down by Lord Maccles-

field, that a contract to pay a certain sum on a certain day was sufficiently performed "according to the original intent of the case" by paying the money with interest at any future time, ought in common sense to have resulted in the overthrow of the proposition. As a matter of fact, although "the original intent of the case" may at first have furnished the only pretext for interference, for a long time past this ground of jurisdiction has exercised little, if any, effect on the decisions. It should be borne in mind that Lord Macclesfield, in the leading case of *Peachy* v. *Duke of Somerset* (1 Stra. 447), expressly limited the right to relief in Equity to those cases "where the penalty is designed only to secure money;" but in course of time this limitation came to be disregarded, and relief was given not only where the penalty was designed to secure money, but also where it was designed to secure the performance of any contract for the non-performance of which pecuniary compensation could be made, the penalty being in Equity regarded merely as a security for the damage really incurred.

The argument for this extension of jurisdiction would seem to run thus: Where a penalty is designed only to secure money, Equity relieves; damages for the non-performance of a contract, for which pecuniary compensation can be made, may be reduced to a sum of money; Equity regards a penalty for the non-performance of such a contract as designed merely to secure that some of money; therefore, the penalty being, if you look into it, designed in point of fact only to secure money, will be relieved against. Once grant the premises, and it is not easy to avoid the conclusion. It does not at present concern us to inquire into the abstract merits of this extension of Equitable jurisdiction. Let it be granted that there are grounds on which it may be justified, but if the "original intent of the case" is all that is to be looked to, it is surely carrying astuteness to the verge of absurdity for the Court to discover within the four corners of a document whereby A. agrees to buy B.'s house for £1,000, on pain of forfeiting £100 to B. if he fails to carry the agreement into effect, that the real intention of the parties was not that A., on refusing to complete his purchase, should pay B. £100, but that B. should merely have the right to recover from A. such damages for breach of contract as the Court or a jury might be disposed to award; a right which B. would have enjoyed none the less if no penalty had been stipulated for, though in that case he might have run more risk of not getting his money. But we are by no means prepared to assert with confidence that such a construction would not recommend itself to the Judicial intellect. Indeed, it would appear from the Reports that long after the full-blown doctrine came into operation the Judges continued to "lay the flattering unction to their souls" that they were effectuating the true intention of the parties.

That this should be so is, after all, scarcely a matter for surprise, for when we reflect on the somewhat analogous doctrine of conditions *in terrorem*, we appreciate the difficulty of assigning any limit whatever to the ingenuity of the Judges in the construction of the English language, Persons capable of deciding that a testator who gives £100 a-year to his widow, to cease on her marriage, does not really mean the annuity to cease, but only that his widow should think so, and thereby be intimidated into remaining faithful to his memory, clearly do not hold themselves bound by any of the ordinary canons of construction; and surely it by no means exceeds the bounds of possibility that such persons should hold the insertion of a penalty for the non-performance of a contract to be intended merely as a means of frightening a contracting party into performing his agreement, on the chance that he might suppose (contrary to the fact) that it was really intended to enforce the penalty in the event of his failing to fulfil his obligation.

But whatever the precise line of argument may have been by which the Judges justified themselves in supposing that they were carrying the intention of the parties into effect by decreeing that penalties ought to be considered merely in the light of a security for the payment of any damages that might be assessed, it is abundantly clear that the doctrine professed to be based exclusively on the "original intent of the case;" and, as we have seen, that continues, according to the best authorities, as expounded in Tudor's Leading Cases, to be the only osten-

sible ground on which relief is given. Nevertheless, of late years it has been repeatedly held that the only question to be decided is whether the sum to be paid on the non-performance of an agreement can, in point of fact, be regarded as liquidated damages, or whether it comes under the head of a penalty, and if the latter construction is adopted relief is given as a matter of course, so that in effect the Judges now act on the principle that relief against penalties will always be given. Now the bare proposition that Equity relieves against penalties is somewhat broader than that laid down by Lord Macclesfield; his proposition is that Equity relieves against penalties *which were not originally intended to be enforced*, an important qualification, of late entirely ignored. If relief against penalties is not given on grounds of public policy, but only because of the assumed intention of the parties, there can be no reason why the parties should not declare how their contract should be read, and if they choose to declare that what the Court would otherwise deem to be a penalty shall be considered as liquidated damages agreed upon between them, then, according to Lord Macclesfield and the earlier cases, Equity would have no ground for interference. This would seem to be the view taken by Lord Eldon, who says (*Shackle* v. *Baker*, 14 Ves. 469) that under a covenant upon sale of good-will not to carry on the same business as the purchaser, the parties may proceed to ascertain for themselves what shall be the damages for the breach of it, "and unless they are so awkward as to put that in the shape of penalty instead of liquidated damages, there is a perfect and absolute remedy." Still more to the point are the observations of Chief Justice Gibbs in *Barton* v. *Glover* Holt, N. P. 43), who, after observing that in *Astley* v. *Weldon*, 2 B. and P. 346 (sometimes cited in favour of the view that declarations of intention are not conclusive), there was no stipulation that the damages should be liquidated, said with regard to a clause providing that a sum named to be paid on breach of covenant should be considered as liquidated damages, "In the present case, unless the damages are to be considered as liquidated, and definitely ascertained by the parties themselves, the clause in the agreement means nothing."

It would appear then that in the year 1816, when this judgment was pronounced, the authorities favoured the view that although, in the absence of any express declaration by the parties, the Court would look at the whole agreement and collect therefrom whether a sum to be paid on the non-performance of it should be regarded as a penalty or as liquidated damages, nevertheless the express declaration of the parties should always be conclusive. If the "original intent of the case" is all that is to be looked to, surely it follows, as a matter of course, that this should be so. What the Judges have to decide, according to their own showing, is not whether a certain sum which A. has engaged in certain events to pay to B. is or is not, as a matter of fact, in the nature of a penalty, but whether A. and B. really intended payment of it to be enforced, and an express declaration by them that the sum in question shall be considered as liquidated damages is surely quite conclusive on this head, whatever in point of fact may be the real nature of the payment. The only possible object of christening a penal sum by the name of liquidated damages is to rebut the assumption on the part of the Court of Chancery that penalties are not intended to be enforced. A. and B. enter into an agreement; neither Law nor Equity forbid them from putting any price they please on the non-observance of any part of it, although the price agreed upon may be clearly in the nature of a penalty (*e.g.*, where it is agreed to pay hundreds of pounds in case of a breach that a few shillings would put to rights), provided only that they succeed in making their intention sufficiently plain. Since Equity assumes that penalties are not intended to be enforced, clearly the only way of expressing that Equity is in their case mistaken in its assumption, is to call what is, in fact, a penalty by the name of liquidated damages, and, in accordance with this view, the Judges have over and over again declared that where the parties have put their own price upon *any particular breach* of any agreement, the whole amount may be recovered as liquidated damages, notwithstanding that the breach might be set right by the payment of a much smaller sum, except, perhaps, where it consists merely in the non-payment of a definite

sum of money (see *Kemble* v. *Furren*, 6 Bing. 141) so as to bring the case within the statute of Anne against enforcing the penalty on money bonds.

To any but a lawyer it must seem a strange thing that two persons wishing to bind one another to a perfectly legal agreement should have no other way of carrying their wishes into effect except to declare that they desire the Court to put an unreasonable construction on their agreement. If, however, by any contrivance, no matter how childish, it were possible for persons to reckon with reasonable certainty on being able to frame a perfectly legal agreement so that it could be enforced, there would be comparatively little to complain of. If the Judges had had the courage to adhere without flinching to the rule that whenever the contracting parties called a penalty by the name of liquidated damages, it should be deemed that they intended that penalty to be enforced, then a clear and definite rule would have been established, so that persons, with the aid of a competent lawyer, might effectually have prevented the Court from interfering with their wishes.

Unfortunately, the Judges, while still professing to be guided by the intention of the parties, and recognizing in many cases the abstract right to recover penalties however extortionate, provided only they are called liquidated damages, have adopted a course which often amounts in practice to a denial of that right of free contract which in theory they profess to respect. Where an agreement is capable of several breaches of different degrees of magnitude, it is practically impossible to frame a clause of forfeiture which can be enforced. It will not do to stipulate that if the agreement is infringed *in any particular* a specified sum shall be payable as liquidated damages, "for," as Baron Parke observed in *Homer* v. *Flintoff* (9 M. and W. 678), "where parties say that the same ascertained sum shall be paid for the breach of every article of an agreement, however minute and unimportant, they must be considered as not meaning exactly what they say;" * so that what has been declared to be liquidated damages will be construed as a penalty, which will not be enforced, no matter how gross the breach may have been. The Law on this subject has been stated by the Privy Council (*Dimech* v. *Corlett*, 12 Moo. P.C., p. 229) as follows:—"The Law of this country on the question of penalty, or liquidated damages, may be considered, after a great number of decisions—not, perhaps, all of them strictly reconcilable with each other—to be, however, at length satisfactorily settled, and the hinge on which the decision in every particular case turns, is the intention of the parties, to be collected from the language they have used. The mere use of the term 'penalty,' or the term 'liquidated damages,' does not determine that intention, but like any other question of construction, it is to be determined from the nature of the provisions and the language of the whole instrument. One circumstance, however, is of great importance towards the arriving at a conclusion; if the instrument contains many stipulations of varying importance, or relating to objects of small value calculable in money, there is the strongest ground for supposing that a stipulation, applying generally to the breach of all, or any of them, was intended to be a penalty, and not in the way of liquidated damages."

Baron Alderson, indeed, in the abovementioned case of *Horner* v. *Flintoff*, suggests that "where some breaches relate to important, and others to unimportant, matters, parties ought to annex a specific penalty to each breach." This suggestion clearly fails to meet the difficulty, and its inadequacy is well illustrated by the very agreement that called it forth.

By that agreement the Defendant promised to buy the good-will, stock-in-trade, and tenant-right of the Plaintiff, who was an innkeeper and farmer. The Plaintiff promised to give the Defendant possession of certain premises together with furniture, farming stock, etc., and in the meantime to pay rates, taxes, etc., and indemnify the Defendant from all costs and expenses by reason of the non-payment of the same. The Defendant promised to pay £100 for the tenant-right, to take the furniture, plate, etc., and to pay the amount of the valuation, and all rents, rates, and taxes, and to indemnify the Plaintiff from the same. Surely, it would have puzzled the learned Baron himself to draw a schedule of liquidated damages

* Really, one would think the Judges had never heard of such a thing as a fiction before.

for every possible infringement of an agreement like this. If any such attempt should ever be made there will indeed be plenty of work for the lawyers. What delightfully perplexing questions might arise out of every item in such a schedule! Testators who make their own wills (including even ex-Chancellors) are well known to be a godsend to the lawyers; how much more the parties who should endeavour to schedule every possible infringement of their agreement. Practically, then, the performance of agreements, of which there may be many breaches, cannot be secured by means of penalties, nor even can moderate damages for the breach of such agreements be settled by contract between the parties, except, perhaps, to a very limited extent, for certain specified breaches capable of being accurately defined. For this unsatisfactory result, which has, of late years, not escaped severe judicial comment, it is difficult to say whether Law or Equity is most to blame.

The cases limiting the right of persons to have their intentions carried into effect by calling penalties by the name of liquidated damages were all of them decided at Common Law, nominally under a Statute of William III., instead of under the Rule of Equity as enunciated, though not apparently for the first time, by Lord Macclesfield; but as it is the unanimous opinion of all the Judges who have ever discussed the point that the Statute was only passed in order to import the Equitable Rule into the Courts of Law, and thereby do away with the necessity of going into Equity for relief, and that the same rule does and ought to obtain in both *Courts*, or, as we now say, *Divisions*, it would seem that Equity is the original offender. But then we must recollect that Equity had, in some cases, a good excuse for interference, owing to the very singular circumstance that persons were in the habit of putting their hands to agreements which did not in fact express their real meaning, a state of things for which the technicalities of the Law were presumably responsible.

There is another doctrine connected with the law of penalties which adds to the difficulty of extracting any intelligible principle from the cases. It has been shown that in the case of a complicated agreement involving many possible breaches, a penalty extending to every breach cannot be made enforceable under the name of liquidated damages, and it has frequently been held that an agreement to buy a public-house, even where the agreement contains no complicated stipulations as to indemnity, valuation, &c., comes within the category of agreements to which no enforceable penalty can be attached. Oddly enough, however, though no penalty, either *eo nomine* or under the guise of liquidated damages, can be stipulated for, yet it is perfectly lawful to stipulate that the intending buyer shall, on signing the contract of purchase, pay a deposit, and that in the event of his declining to complete the sale that deposit shall be *forfeited*. It has lately even been held (*Hinton* v. *Sparkes*, L. R. 3 C. P. 161) that under such a clause of forfeiture an action may be brought on an I.O.U. which has been accepted as a deposit instead of a cash payment.

It is difficult to see on what principle the mere fact of an intending buyer having paid, or promised to pay, a deposit on the purchase-money, should render him liable to a penalty for the non-completion of his purchase, which, but for such payment or promise to pay, could not have been enforced.

The fact is that the assumption of the Court of Chancery, ratified to some extent by statute, of the power of construing written agreements, not according to the plain meaning expressed by the parties, but according to what the Court may consider ought to have been their meaning, has resulted, and could not but result, in numerous contradictions and absurdities. It is often difficult enough to put a satisfactory construction on written agreements, even starting with the assumption that the intention of the parties was to express within the four corners of the agreement what they really meant; but if we start with the contrary assumption, that the parties do not mean what they have said, but something else which the Court is of the opinion, under the circumstances, they ought to have meant, we have clearly constructed for ourselves a very pretty puzzle indeed.

We have already observed that we are willing to give Equity the credit of having been actuated by the best of motives

in tampering with the plain meaning of written agreements, but the policy of the Court, though doubtless well intentioned, was, we cannot help thinking, a mistaken one. The doctrine of relief against penalties, if it is to be justified at all, must be justified on very different grounds from those hitherto assigned, and restrained within very narrow limits. We are aware that, from time immemorial, it has been, and still is, the invariable practice to instance the interference of Equity on behalf of the oppressed mortgagor as an ever memorable example of the courage and dexterity with which the Chancellors frustrated the iniquities of the Law, and contrived to do complete justice between man and man. At first sight this view of the case, no doubt, seems plausible enough. It is certain that the legal position of a mortgagor is one of intolerable hardship, and it is equally certain that although the law of mortgages is by no means free from doubt and difficulty, an ordinary mortgage deed does, owing to the intervention of Equity, work substantial justice between borrower and lender. Equity, then, has provided an efficacious remedy against a particular form of injustice, and is, so far, *prima facie* entitled to our thanks; but before entering final judgment various considerations must be taken into account which, unless we are very much mistaken, will be found quite sufficient to make us pause, and feel uncomfortable doubts as to whether it was altogether politic to lay down the rule that the intention of the parties to an agreement is not always to be deduced from the plain meaning of the document they have subscribed, and to invest the Court with full power and authority to bind persons to the observance of a contract very different from the one which they had in fact executed. In estimating the services rendered by Equity to impecunious mortgagors it would seem to be taken for granted that, but for the intervention of Equity, they would constantly be obliged to submit to the grossest injustice under sanction of the Law. The form of mortgage deed at present in use has, with a few variations, served for so many generations the turn of thriftless landlords and thrifty capitalists, that, at last, it has become impossible for the legal mind to conceive the notion of land being made available for purposes of borrowing, except through the instrumentality of a document drawn up in accordance with the precedents of Bythewood or Davidson. In making this assumption the profession have greatly underrated both the common sense of mankind and their own integrity. It appears to us very certain that if Equity had not interfered the result would have been, not the wholesale and continuous ejection of landlords from their ancestral tenements (which is the view of the case always presented to the law student), but the overthrow of the present absurd form of mortgage, and the substitution of another expressing, in clear and distinct terms, the real agreement between the parties. Equity, by the very process of healing over the surface, has perpetuated, instead of extirpating, the disease it professed to doctor, and, to our thinking, the last state of the patient is worse than the first.

If the only result of patching up the relations between mortgagor and mortgagee had been to perpetuate a form of mortgage purporting to bind persons to stipulations they never intend shall be carried into effect, that of itself would be no inconsiderable evil, for it is quite unworthy of a civilized people that one of the commonest forms of contract should be drawn up in such a way as to require the interposition of the Court of Equity to prevent the perpetration of a gross injustice. Such a clumsy method of doing justice between man and man might recommend itself in an archaic state of society, which delights in tricks and fictions, but is quite out of place in a nation that has deliberately done away with Messrs. John Doe and Richard Roe, Fairtitle and Goodright, and is laying to heart the important lesson that justice ought to be dealt out in a straightforward and intelligible manner. Unfortunately, the heroic remedy adopted for the relief of mortgagors has, as we have seen, led to other results more serious than the retention of an absurd form of mortgage deed. The refined instinct, by virtue of which the Equity Judges felt themselves competent to discover the real intention of the parties to a mortgage, without any other evidence than that afforded by a deed, in which a very different intention had been expressed, was soon brought to bear upon other contracts besides mortgages, to the great gain of the profession and the con-

sternation of contracting parties, who found their agreements construed for them by the light of rules which to the minor disadvantage of entirely defeating the obvious intent of the contract, added the more serious evil of practically curtailing the acknowledged rights of contracting parties and of being uncertain in their application. Nominally it is perfectly lawful to enforce the performance of an agreement through the medium of liquidated damages, but the result of the decisions is, as we have pointed out, to render it impossible to frame a certain class of agreements so as to enforce payment of the damages stipulated for, while on the other hand some arguments may be easily expressed in such a way as to render them enforceable under the sanction of what is, in point of fact, a penalty.

In allowing parties to name their own liquidated damages, the principle of enforcing agreements through the medium of penalties was admitted; surely then it would be wiser to do away with the vexatious and uncertain restrictions encumbering the exercise of a right which is admitted in all but the name, particularly as these restrictions profess, as we have seen, to be grounded not upon motives of public policy, but only upon a notoriously false presumption as to the intention of the contracting parties. This presumption has now afforded work for the Bar, perplexed the Bench, and exasperated suitors, for two hundred years—a sufficiently long trial in all conscience. In venturing, as we have done, to suggest that written agreements should for the future be construed according to the plain meaning of their contents, we cannot do better than shelter ourselves under the authority of Barons Martin and Bramwell. The former learned Judge, while feeling himself bound by the cases to decide against enforcing a penalty for the breach of the agreement before the Court, observed (*Betts* v. *Burch*, 28 L. J. Ex. 269) that in his opinion "persons being at liberty to enter into any bargains they think fit, the proper mode of ascertaining what the bargain is, if it be in writing, is to ascertain what the expressed meaning is, and carry out that meaning. If a person has made an improper bargain, it would be a warning to others not to enter into such bargains. A great deal of the difficulty in the administration of the law arises from the having to ascertain what is the meaning of agreements that parties have made; but if the Court of Law were simply to ascertain what the parties have expressed, and carry those expressed bargains out, much of the difficulty would be removed. I consider, however, that I am not at liberty to act upon that view with respect to that question." Mr. Baron Bramwell said, "I quite agree with my Brother Martin in thinking the best possible thing would be to let people make agreements and keep to them, according to their words, till they are tired of it, and then you will find out that this little piece of paternal legislation—[*i.e.*, the Act of Will. III., above referred to]—has introduced a great deal of mischief because it has introduced a great deal of litigation."—*Law Magazine.*

CANADA REPORTS.

ONTARIO.

(Reported for the *Law Journal* by H. T. Beck, M.A. Student-at-Law.)

COMMON LAW CHAMBERS.

Snow v. Cole.

Judgment, setting aside—Alien—Service—Special endorsement.

When a specially endorsed writ was served in Ontario on the defendant who was described as "of the city of Detroit, in the State of Michigan, one of the United States of America,

Held, that final judgment in default of appearance was irregular, and was accordingly set aside.

[May 19.—Mr. Dalton].

This was a motion to set aside a final judgment as irregularly signed the defendant being described in the writ as residing in the United States, but having been served in Ontario.

Osler showed cause. The form under C.S. U.C. cap. 22, sec. 15, expresses the writ to be for service in Ontario. Form A, No. 3, at the end of the act is expressed to be for service beyond the jurisdiction. The first irregularity should have been attacked, and the writ could have been amended if necessary. The defendant was temporarily in Ontario, and might have been described as of the place when served. This is the only irregularity, if any, in the proceedings: *Jackson* v. *Spittall*,

L. R. 5 C. P. 542; *Covert* v. *Robertson*, 31 U.C. Q. B. 256; *Herr* v. *Douglas*, 4 Prac. R. 102.

H. J. Scott in support of the motion. This is not such a writ as can be especially endorsed. It is not alleged that the defendant was even a British subject, and the writ described him as without the jurisdiction. If a foreigner, he could not have been served at all: C.S. U.C. cap. 22, sec. 45. Form A No. 1, and A No. 3, are expressed to be for use according to the defendant "*resides* within the jurisdiction," or "*resides* out of Upper Canada." It is not necessary for the defendant to attack the writ: *Hesketh* v. *Fleming*, 24 L. J. N.S. Q.B. 255.

Mr. Dalton thought that the signing final judgment under such circumstances was irregular, and set aside the judgment.*

Ballantyne v. Campbell—Ballantyne v. Martin.

Held, that under sec. 35, Con. Stat. U.C. cap. 22, read with sec. 37, if the bail render their principle to the sheriff of the county in which the action is brought they are entitled to have an *exoneretur* entered on the bail piece, and it is immaterial whether the render be before or after judgment.

[June 21.—Mr. Dalton].

This was an application to stay proceedings in the first suit which was against the sureties in a bail bond, and to enter an exoneretur on the bail bond in the second suit.

The principal had been rendered to the sheriff of the county in which the action had been brought, and the sheriff to whom the writ was directed in consequence returned the writ *non est inventus* before the return day. Judgment was entered against the principal, and the sureties sued before the time limited for returning the writ.

S. Smith shewed cause. After judgment C. L. P. Act sec. 37, should be complied with, and the render should be to the sheriff to whom the writ was directed, and the defendant should have pleaded the render and not have applied in a summary way.

Osler in support of the summons. Sec. 35 and 37 should be read together. The render can be to either sheriff. The writ was returned too soon, and the action commenced before the return day.

Mr. Dalton thought that the render might be made either to the sher.ff of the county in which the action was brought, or to the sheriff to whom the writ was directed, and that the action on the bond was brought too soon. An order was made to stay proceedings in the first case and to enter an exoneretur on the bail bond in the second case.

Mitchell v. Mulholland.

Prohibition—Division Courts.

Held, that Con. Stat. U.C. cap. 19, sec. 117, giving the judge power to grant a new trial within fourteen days is only directory, the Court having an inherent power to grant a new trial at any time.

[June 29.—Morrison, J.]

This was an application for a writ of prohibition directed to the Junior Judge of the county of York, and the opposite parties in a Division Court suit, restraining them from proceeding to trial under an order for a new trial made by the Judge, the application having been made after the expiration of fourteen days from the former trial.

D. B. Read, Q.C., supported the summons.

Morrison, J. thought that the section was only directory, and that the judge had power to grant a new trial at any time.

Summons discharged.

CHANCERY CHAMBERS.

Alexander v. Watson.

Notice of motion—Admission of service—Time.

Where a notice of motion was served after four o'clock and service was admitted as of that day, no objection having been taken until the motion was moved in Chambers,

Held, that the admission of service precluded the party served from raising the objection.

Held also, that when the motion is for a better affidavit on production, two days notice is sufficient.

[May 9.—Mr. Stephens].

Motion for a better affidavit on production.

D. Black objected that a four days notice of motion was required: *Abel* v. *Hilts*, 6 Chy. Ch. 122. The service was made after four o'clock on Friday, and Sunday does uot count.

D. M. McDonald in support of the motion contended that the objection could not be taken as it had deen waived by the admission of service.

The Referee—I think the admission of service having been given without any objection to the hour at which it was served, and no objection having been afterwards taken until the argument of the motion, it must be held to have been served on the day on which service was admitted. I think also that where

* This case has been appealed. It was argued before Morrison, J., and stands for judgment.

the motion is for a better affidavit, two days notice is sufficient.

Ray v. Maas.

Service—Delay.

Service of a bill of complaint will be set aside if made after the time limited, unless the delay is clearly and satisfactorily accounted for, and especially where it is shown that the defendant might be prejudiced by the delay.

[May 31.—Mr. Stephens].

This was a motion to set aside the service of a bill of complaint. The service had not been effected within the time limited. The bill was filed in April, 1876, and the defendant was not served until May, 1877.

Howard, for plaintiff, read an affidavit stating that the defendant's residence was for some time unknown, that it had been necessary to amend the bill, and that there was no intention to delay, citing: *Bell* v. *Hastings*, 7 Beav. 592; *Dalton* v. *Hayter*, 7 Beav. 586; *Tugwell* v. *Hooper*, 10 Beav. 19. The defendants desired to compromise, and their last offer was made since the service of the bill.

Hoyles for defendant. The delay has not been sufficiently accounted for. The utmost deligence should be used in such a case. The lands in question are mining lands, and their value fluctuates. Fraud has also been charged.

The Referee.—I think the delay has not been sufficiently accounted for or excused. The residence of the defendant Maas has been known since September last, and the necessity for amendment since the same date, yet nothing was done for months, while the pleadings and examination of the parties show it to be a case where the plaintiff should use more than ordinary diligence rather than less. The order will go setting aside the service.

Seaton v. Fenwick.

Supplemental answer—Amendment—Limitations, Statute of.

The Court will allow a supplemental answer to be filed setting up as a defence the Statute of Limitations.

[June 5.—Mr. Stephens].

This was a motion for leave to file a supplemental answer setting up a previous judgment and the Statute of Limitations.

H. Cassels for plaintiff. A supplemental answer will not be allowed except to state new facts which have come to the knowledge of the defendant since the filing of the answer. The defence must be meritorious. The defendant is too late to be allowed to plead the Statute of Limitations: *Brigham* v. *Smith*, 3 Chy. Chamb. 313; *Percival* v. *Caney*, 14 Jur. 473.

Hoyles for defendant. The cases cited do not now apply. The Statute of Limitations is now considered a meritorious defence: *Manning* v. *Wilson*, (Dec. 22, '74—V.C. Blake). Amendments are now allowed at any time: *Hamelin* v. *White*, 6 Prac. R. 120.

The Referee thought that the order should go giving the defendant leave to file the supplemental answer on payment of costs.

Olmstead v. Rutherford.

Recision of order—Next friend.

Upon a motion to limit the time for appointing a new next friend, and in default to dismiss the bill, the question as to the necessity of a next friend cannot be discussed; the original order must be first rescinded.

[June 5.—Mr. Stephens].

This was a motion to limit the time for appointing a new next friend, and in default to dismiss the plaintiff's bill.

Macdonell, for plaintiff, submitted that there was no necessity for a next friend, 36 Vict. cap. 16, enabling a married woman to sue alone.

Hoyles for defendant.

The Referee—I think I cannot consider the point on this application. If the plaintiff's contention now is correct, he must take the necessary steps to get rid of the order which before he assented to; the order must go as asked.

Re Warmington.

Executor—Guardian.

The Court will not make an order allowing payment of money by a guardian where the will gives him full power as executor to distribute the estate to the parties entitled, and the money is not in Court

[June 2.—Mr. Stephens].

This was a motion for an order authorising the guardian of one Joseph Warmington, to pay over to him his share of stock, he having come of age.

Hamilton in support of the application.

The Referee—The executor does not require the order of this Court, he has all the necessary authority under the will for payment to the parties entitled, as they attain their majority. The funds are not in Court nor is the estate being administered by the Court. I therefore think the order should not be made.

Thompson v. McCarthy.

Mortgage—Redemption.

The purchaser of an equity of redemption in lands pending foreclosure, who has paid off the plaintiff, is not entitled to the assignment of the mortgage debt; he can only demand a re conveyance of the premises or a discharge of the mortgage.

[June 20.—Mr. Stephens].

This was a motion for an order on plaintiff to assign the mortgage in question to the defendant McCarthy, he having paid the amount due on the mortgage to the plaintiff.

Ryc for the plaintiff.

The defendant's can compel a re-conveyance and are not obliged to accept a discharge. The plaintiff's solicitor refused to give anything else: *Finlayson* v. *Mills*, 11 Gr. 218; *Clark* v. *May*, 16 Beav. 273; Leith Real Prop. Stat. 350; Story Eq. sec. 1035; *Stronge* v. *Hawkes*, 2 Jur. N.S. 388.

Mulock for plaintiff. The plaintiff is bound to assign the premises, but not the debt. The defendant having been a purchaser of the equity of redemption, his legal position was that he was bound to pay off the mortgage debt: *McDonald* v. *Reynolds*, 14 Gr. 691. All that the mortgagee is bound to do is to transfer the legal estate: *Dunstan* v. *Patterson*, 2 Philips 341-345; *James* v. *Biou*, 3 Swans. 241; Seaton on Decrees, v. 1, p. 439; Fisher Mort. 979, vol. 2, Ed. 1868; *Smith* v. *Green*, 1 Col. 563.

The Referee refused the application so far as it asked an assignment of the mortgage and mortgage debt, the defendant to have the costs of the motion.

Swan v. Adams.

Dismissing Bill—Security for costs.

Where the plaintiff had parted with his interest in the lands in question, proceedings were stayed until security should be given for the costs, or until the suit was revived.

[June 21.—Mr. Stephens].

H. Cassels moved on behalf of the defendant Wilson for an order to dismiss plaintiff's bill, or for security for costs on the ground that plaintiff had parted with his interest in the property in question.

Appelbe for plaintiff contended that defendant was only entitled to have security for costs if plaintiff were insolvent and carrying on the suit for another's benefit: *Mason* v. *Jeffrey*, 2 Chy. Ch. 15. The defendant should have produced a certified copy of the conveyance: Daniel Prac. 270. The case of *Johnston* v. *Thomas*, 11 Beav. 501, shows that the suit is only defective. The plaintiff has a right to go on for his costs: *Wallace* v. *Ford*, 1 Chy. Ch. 282. The proper course was to give plaintiff notice to revive: *Cameron* v. *Eager*, 6 Prac. R. 117.

Cassels in reply. The Court has a discretion in matters of security: *Hagarth* v. *Wilkinson*, 12 Q.B. 851; *Lindsay* v. *Hurd*, (Blake, V.C.) There is no prayer for damages, and the plaintiff will not be permitted to harass the defendant when his interest has ceased. He can have no costs except the filing of the bill.

The Referee thought that the order should go to stay proceedings until security should be given, or the present defective state of the record cured.

Yourex v. Alcombrack.

Taxes—Rents and profits—Purchase money, interest on—Possession.

When a purchaser had paid school taxes for the year and had paid his purchase money, the plaintiff having received the rents and profits up to a time subsequent to the payment of the money into Court, and subsequent to the end of the year for which the taxes had been paid. Upon an application on behalf of the plaintiff to have the money paid out to him, the purchaser was held entitled to be repaid the taxes and the interest on his purchase money during the time the plaintiff received the rents and profits, the plaintiff to have the excess (if any) of such interest over the rents and profits.

[June 27.—Mr. Stephens].

This was an application for the payment out of Court to the plaintiff in a mortgage suit of the amount found due him. The purchaser asked to be paid the sum of $78, the amount of half year's interest, also school taxes for 1876, and that he should be discharged from paying interest on his purchase money to 8th October, 1876. The purchase money was paid into Court May 22, 1876.

Hoyles for purchaser, relied on *Bank of Montreal* v. *Fox*, 6 Prac. R. 217; *Brady* v. *Keenan*, 6 Prac. R. 262; *Liscombe* v. *Gross*, 6 Prac. R. 271.

Crickmore for plaintiff, contended that the conditions of sale made an express contract to pay interest for three months.

The Referee—The order may go on payment by the purchaser of the difference (if any) between the rents and profits and the interest during the period in dispute.

Jackson v. Robertson.

Amendment.

The plaintiff will be allowed to amend his bill after replication without alleging the truth of the proposed amendment, even when the defendant on her examination denied its truth.

[June 27.—Mr. Stephens].

This was an application by the plaintiff to amend his bill after replication filed. The bill was filed for the specific performance of an alleged agreement by husband and wife for sale of the wife's lands. The wife in her answer denied having signed any such agreement, and, on her examination, denied having given her husband any authority to sell the property in question. It was sought to amend the bill by alleging that the husband had signed the agreement as agent for his wife and by her authority.

Hoyles for defendant, contended that the truth of the proposed amendment should be alleged in plaintiff's affidavit.

Watson for plaintiff. The amendment raises a question of law to be determined on the facts.

The Referee granted the order on payment of costs.

CORRESPONDENCE.

Defective Registration.

Toronto, July 28th, 1877.

To the Editor of the Law Journal:

Sir,—In your issue for this month you mention as the first item of legal intelligence that the Supreme Court of Illinois has lately held that the rights of a mortgagee, whose mortgage has been recorded in the books of registry are not affected by the fact that the mortgage had not been duly indexed, referring to *Mutual Life Ins. Co.* v. *Dake*, 4 Cent. L. J. 340.

You need not go so far for a decision on the point. If you refer to *Lowrie* v. *Rathburn*, 38 U.C. Q.B. 255, you will find the point similarly decided by the Court of Queen's Bench in this Province. Although the case was reversed on another ground—a question of evidence—this point is unaffected, and the case remains a decision on such point.

A Constant Reader.

The Law of Dower.

To the Editor of the Law Journal:

Having perused your valuable remarks in the *Law Journal* of June under the caption of "Law of Dower," I examined to some extent the question whether a widow has any *estate* in lands of her deceased husband out of which she is entitled to Dower before assignment thereof; and I venture with some diffidence to submit the result of my researches.

I venture to think that your conclusion "that it cannot be said that the law on this point is settled," is rather a hasty one. I admit that at first blush the cases do seem to conflict with one another; and that the element of uncertainty does seem to prevail; but upon closer inspection this uncertainty, in a great measure, disappears. One is very apt, from a superficial glance at *Acre* v. *Livingstone*, 26 U. C. Q. B. 282, to carry away the erroneous idea, that the Court was divided on this question. Reasoning from these premises, namely, the supposition that there are conflicting opinions of two very learned and eminent members of the bench on the same point, the conclusion would be correct that the law is unsettled and in an unsatisfactory condition. But, upon a more critical perusal of the case, it will be found, as I shall endeavour to show, that the premises are false; that not only did their Lordships not differ on this question, but that the very foundation of the strong and able dissenting judgment of Hagarty, J., is the assumption that there is no estate in the widow, founded upon or arising out of her right to dower; wherein he agrees with the other members of the Court.

The opinion of such a learned and eminent Judge as the present Mr. Justice Strong, who, when Vice-Chancellor of the Court of Chancery, is reported in *Collyer* v. *Shaw*, 19 Gr. 599, as disavowing his concurrence with the "majority

only of the Judges of the Court" in *Acre* v. *Livingstone*, would have thrown great doubt upon the question, had there been but a majority of the Court in favor of the view which I advocate, and had that point come expressly before him for adjudication. *Collyer* v. *Shaw*, however, was not decided upon this question. That the merest glance was bestowed upon *Acre* v. *Livingstone*, and the other cases cited to the Court, is, I think, evident from the reasons which I shall give. One, and the strongest, is that his Lordship is reported to have disavowed his concurrence with the *majority* of the Court. It will be seen that the Court were not divided upon the question, but were unanimous. His Lordship also said that he, nevertheless, was not at liberty to disregard the cases referred to; and therefore must have attached sufficient weight to them to cause him to abandon this ground, and decide *Collyer* v. *Shaw* on another one. Hence, we can hardly conclude that the opinion of the learned Vice-Chancellor is opposed to, or conflicting with, the principle recognized in *Acre* v. *Livingstone*.

Having thus endeavoured, and I trust not without some success, to clear away the doubt which might be founded on *Collyer* v. *Shaw*, I shall attempt to reconcile the opinions of the members of the Court in *Acre* v. *Livingstone*. His Lordship Chief Justice Draper, relying on the authority of the Touchstone and *Doe McKenny* v. *Johnson*, 4 U. C. Q. B. 508, that the widow, being rightfully in possession at her husband's death, is therefore merely a tenant at sufferance, concludes that the language there used correctly described the position of the widow in this case; and that therefore there was no such *estate* in her as a release would operate upon. It was necessary in this case, first to determine that question, in order to ascertain the effect of a certain deed of release, the construction of which was asked the Court. The only operative words in this deed were, "remised released and forever quit-claimed." The question then arose, how far the words used would serve to cause the deed to take effect as a *grant*. And the words used were *per se*, in his Lordship's opinion, insufficient to *pass an estate*. Morrison, J., was of the same opinion. It was on this latter point that Hagarty, J., dissented from the rest of the Court; namely, the question as to whether the deed, containing the operative words of a release only, while failing to operate *as such*, could be construed as a *grant*. And, before the necessity for even discussing this point arose, the learned Judge must have entertained a serious doubt as to the existence of such an estate in the widow as would give effect to the *release as such*. This doubt, if it did not become a certainty in his Lordship's mind, at any rate assumed such vast proportions, that he abandoned all attempts to make the deed operate as a release, and becomes "astute" in discovering means whereby to make it attain its intended object in some other way. It is plain then that his Lordship, for the purpose of this case at least, instead of dissenting from, entirely concurs with the rest of the Court in the opinion that the widow had *no estate* in the lands; otherwise the release would have been operative as such. It is true that we find his Lordship saying, at p. 294, "I should pause long before holding the deed valueless as a mere release." But it is also true that his Lordship premised this, by saying, "It is not necessary for me to decide finally on its possible operation in the * * * sense" of enlarging the interest of the widow. Probably, the gist of what his Lordship's judgment might have been, had he expressed his opinion decidedly on this point, is foreshadowed by what he says at p. 293; and that it was some interest, analogous to that of a disseisor or tenant at will in possession of the *whole*

lands, and not that of the widow in possession *as such* entitled to and claiming her dower, which his lordship contemplated as existing, in order to make the release effective as such if at all, is, I think plainly indicated by the words above referred to, which are as follows: "A disseisor can take a release, so can a tenant at will. It may, without presumption, be termed a subtlety, however respectable by long descent and universal acquiescence, that the widow here in possession should be in a worse position than either of the others. She is either tortiously keeping the true owner out of possession, or she is holding with his assent." In either of these cases, however, the interest (if an estate at all) is not that of the *widow* entitled to dower: It is that of a stranger in possession—it may be a disseisor—it may be (having the terre-tenant's assent)a tenant at will. Let the widow, however, be out of possession, or let her be in under her right of quarantine, and his lordship's words are bereft of their significance. She then would have no interest other than that of a widow claiming dower; and his lordship's remarks fall far short of showing that that interest or right *is* an *estate*. Did any doubt, however, still exist as to the effect of what his lordship did say is it not dispelled by his own words at p. 292? "I have arrived at this conclusion regarding the deed as *passing an estate* in possession; *not as enlarging an existing interest* by release of reversion." And this is quite agreeable with the conclusion at which the rest of the Court arrived; and which is expressed by the learned Chief Justice in the following words, at p. 286: "The release can operate only by way enlargement; to which it appears to me to be a conclusive answer, that there was no privity of estate between the parties, and that the widow had *no estate* actually vested in her, which was capable of enlargement." In further support of this view, we have the opinion of that learned and careful Judge—Mr. Justice Wilson. In *Miller* v. *Wiley*, 16 U. C. C. P. 542, he says "it is an interest though not an *estate* in the land," and in *Carrick* v. *Smith*,34 U.C.Q.B.,377,he expresses himself thus forcibly: "She was entitled to dower, but she had never claimed it, nor had it been assigned to her. She had *no estate* in the land, but a right to have one established for her."

We find the same opinion existing on the Equity side and expressed by Vankoughnet C., in *McAnnany* v. *Turnbull*, 10 Gr. 299. "The widow has no *estate* in the land till her dower is assigned to her. * * Until then the widow really has nothing in the land. She merely has a right to procure something, *i. e.* dower."

So much for our own Courts. Let us now turn our attention for a few moments to those in the mother country, since you have mentioned some cases as unsettling the law there.

It is perhaps strange that a doubt should at this day arise as to the widow's interest in this respect, when we find the following in Cruise's Digest, Title VI., cap. 3, S. 1. "The widow has *no estate* in the lands of her husband till assignment;" and the opinion of Lord Langdale, M.R., in *Brown* v. *Meredith*, 2 Keen 527. "Until the lands to be held in dower are assigned, the widow has *no estate* in the lands of her deceased husband. She has a right to have her dower assigned, but has no estate in the lands." Any doubts that do exist must derive their origin from *Lloyd* v. *Trimleston*, 2 Molloy, 81. I must premise my remarks on this case by saying that the contest here was, it is true, between the widow and the heir-at-law; but the widow was in possession, not *as widow* claiming her dower, but as *devisee* under her late husband's will, claiming an estate in the *whole* land; and the validity of this will was in dispute. So that the point in question did not

come up expressly for adjudication. However, the remarks of Sir Anthony Hart in his judgment, which seem to conflict with the conclusion I have already arrived at, are very general in their terms, and in force of expression are peculiarly gratifying to the Milesian taste. He says p. 83, "on the death of the ancestor, the heir has title to enter and retain possession until the Court interposes. * * But my opinion of the law is this, that the heir has, upon the instant of the death of his ancestor in possession, a right to enter, and to turn out *by the shoulders* any other person *except only the widow*, who has a right to stay *until her dower is assigned to her.*" Without now considering the question whether this familiar usage, this gentle violence, is forbidden as to the widow by the laws of gallantry, which have such a marked effect on the Hibernian character, we come to the remarks made upon this case in *Talbot* v. *Scott*, 4 K. & J. 117. Sir W. Page Wood in giving judgment says: "It seems to me that the observations of the Lord Chancellor must have been meant to apply to some case of fraudulent or forcible possession which the law will not recognize." And His Honour confesses that he does not understand the Lord Chancellor's words, unless in some such sense as this. But, it will be argued, the widow is excepted from this broad statement; and, before you can make this strong language apply to her, you must show that she is forcibly or fraudulently in possession, and that the law will not recognize that possession. True! but the exception rests upon the assumption that the widow's possession is rightful; and I think that in some cases this ungallant mode of ejectment may apply to her, and in others, not. It is plain that she is rightfully in possession at her husband's death. The question then suggests itself, How long does this rightful possession last?

Under the title *Quarantine*, in Tomlin's Law Dict., we find the following definition: "A benefit allowed by law to the widow of a man dying seised of lands, whereby she may challenge to continue in his capital messuage or chief mansion-house (not being a castle) by the space of forty days after his decease, *in order to the assignment of dower.* And if the heir or any other eject her, she may bring her writ *de quarentinâ habendâ.*" Under the title Dower III., in the same work we find that it was enacted by Magna Charta that "she should remain in her husband's capital mansion house for forty days after his death during which time her dower *should be assigned.*" But in case of a widow out of possession at her husband's death "a woman entitled to dower cannot enter till it be assigned to her and set out either by the heir, terre-tenant or sheriff in certainty." If these authorities be read together with the opinion of Sir Anthony Hart, it will be seen that they are not inconsistent. If the learned Judge's remarks, excepting the widow from the broad proposition which he enunciates, explained by the observations of Sir W. Page Wood in *Talbot* v. *Scott*, can be referred to the possession of the widow under her right of quarantine, then the whole difficulty disappears. And I think that we may not only, not unfairly presume that they should so be referred, when we find such a weight of authority bearing in that direction, but that we should endeavour to make them consistent with the *dicta* of other learned Judges, if possible, rather than accept them as a conflicting authority. That this is their meaning may further appear from the following. His Lordship says: "She has a right to stay *until her dower is assigned to her.*" In the Law Dictionary, above quoted from, it is said, "she may remain forty days *in order to the assignment of dower.*" What more consistent than this! But, is her right of quarantine an *estate*? Manifestly not. It will certainly not

follow as a corollray to the proposition of Sir Anthony Hart. And from what other authority does it appear?

It would appear, from the enactment of Magna Charta, that the heir was bound to assign the dower within the forty days; this time being expressly allowed for the proceedings. But if (from the consent of the widow to a voluntary assignment of the land being withheld, or other obstacles being placed in the way, making it necessary to call in the aid of the sheriff, or if from other causes intervening not chargeable to the heir or terre-tenant), the forty days expire before assignment, then, I apprehend, her right to possession ceased to exist; and Sir Anthony Hart's forcible remarks, as explained by Sir W. Page Wood, would no doubt apply; her possession then being one which the law did not recognize; and eviction *by the shoulders* might be the proper mode of proceeding.

Peculiarly applicable are the remarks of Sir J. B. Robinson, C.J., in *Doe McKenny v. Johnson*, 4 U. C. Q. B., 208. She is "entitled as we may assume, to remain on the estate on which her husband died, as his widow, for a limited period under her right of quarantine, but *staying without right* beyond that period, her dower being * * not yet assigned to her."

The weight of authority would then appear to be in favour of the view that she has no *estate* till assignment.

E. D. A.

Toronto, July 1877.

Query for Ontario Law Makers.

To the Editor of the Law Journal:

The following may be found at page 212 of Dwarris' Treatise on Statutes, with reference to the interpretation of obscure passages:

"But when the intention of a testator "is, as is expressed in one of the old "cases, *cœca et sicca*, and senseless, and "cannot be known, the Courts find out "for him the very last intention he was "likely to have entertained when he sat "down to make a will, viz.: that he "meant to die intestate; and the will is "made void."

Is not this fairly applicable to section 11 of the Public School Amendment Act of Ontario, of last session, as respects Union sections in existence at the time of the passing of the Act?

Yours,

W.

Fergus, July 12th, 1877.

To the Editor of the Law Journal:

Dear Sir,—I send you the enclosed advertisement, clipped from a recent number of the Toronto *Globe*, thinking it sufficiently unique to call your attention to it.

Legal Profession.—There is a good opening for a clever lawyer, Sault Ste. Marie, Algoma, as there is no lawyer at said place but the Crown Attorney; must be a Reformer; a bonus will be given the first year. John Kelly, M.D., or to William Turner, Merchant.

The bonus idea is certainly original, but what it is for does not appear with sufficient clearness; is it for the amount of cleverness to be displayed, and is that amount to be in proportion to the bonus, or is it in payment for the Reform principles to be advocated by the acceptor of the advertisers' offer? I do not know whether this advertisement will strike you as it has done me, but it looks as if they wanted law laid on like gas or water; but the intention is clearly good and in strict accord with public policy, being evidently for the purpose of abolishing *a monopoly* in Sault St. Marie.

Yours truly,

Barrister.

[We have some indistinct remembrance of having passed through the metropolis of Algoma on a fishing expedition last summer. Our attention was drawn to the fact that there was a store there, and possibly William Turner, merchant, was

the happy proprietor. We did not see the M.D. It did occur to us, however, that the Crown Attorney was rather thrown away on such a place. But if the advertisement is successful, things may become a little more lively in the way of litigation, and the evident desire of the "M.D." and the "merchant" each to have a legal backer may be gratified.—Eds. L. J.]

TO CORRESPONDENTS.

Senex.—Communication received, but cannot be published as name of correspondent not given.

REVIEWS.

The English Quarterly Reviews and Blackwood. Leonard Scott Publishing Co., 41 Barclay St., New York.

This is of all others the time of year when the profession can find time to obtain an intelligent understanding of the best literature of the day, enabling them, if they so desire, to add to their libraries such books as they may desire to read at length. But even those who have not time or inclination for this can, without the books, obtain a vast amount of information put in the most readable way. No subject of any importance or interest is left untouched, whilst in Blackwood appear from time to time the best works of fiction of the day.

The International Review. A. S. Barnes & Co., New York & Boston.

The number of this valuable Review for May–June contains the following articles: The New Federal Administration; The Life Insurance Question; Disestablishment of the Church of England; The Philadelphia Exhibition; Tennyson; The American Foreign Service; Recent American and European Books; Art Literature; Contemporary Events.

FLOTSAM AND JETSAM.

The *Central Law Journal* enters an indignant protest against the traditional American style of binding law books in full sheepskin, which it calls "abominable." We agree. If a cheap binding is wanted let it be muslin or paper, if a better, then "half calf," or best of all "full calf."

An Arkansas man, sentenced to be hanged, is in a bad way. The neighbouring carpenters refused to build the gallows, and the sheriff doesn't know how. The prisoner is a carpenter himself, and the sheriff has tried several times to have him build it, but he says he'll be hanged if he will.

Mr. Fry is the first Quaker ever called to the judicial bench, and although I suppose we can hardly expect to see every community represented in a country which, as Voltaire says, has thirty-nine religions and only one sauce, yet we have now had on the bench representative, of all the prominent churches and sects and denominations in the country. The Jews are represented by Sir George Jessel, the Baptists by Justice Lush, the Catholics by Lord O'Hagan, High Church by Lord Coleridge, Low Church by Lord Cairns, Broad Church by Sir Fitzroy Kelly, and the highest form of lay morality (churchwardenship) by Justice Denman. Sir Alexander Cockburn and Baron Bramwell, it is said, keep their religious views very much to themselves.—*Mayfair*.

An Eccentric Judge.—The following sketch of Lord Justice Christian, of the Irish Court of Appeal, is a good description of a very peculiar judge: The duties of his office occupy about 160 days per annum. His leisure is, therefore, more than considerable. How do you think he employs his time? This cross, cranky, jealous potentate reads novels from morning till night. He sees no company, and accepts no invitations. He is married, and has a family. He allows his wife, who is a very pleasant lady, and apparently a very happy woman, to entertain as she pleases up to 6 o'clock in the evening. Then all the guests must go. He never appears until then, and he sits down to dinner in silence. He takes breakfast in his study alone, and after a certain hour in the morning no servant dare come to his level of the hall on pain of instant dismissal. In fact, he must not be encountered on the steps. Sometimes he never leaves the house for weeks together, and then he drives out in a carriage and pair, and, flying through the streets, strikes terror to his species. He once nearly broke down, and, addressing the nearest thing to a friend, said:

"If I ever invited any man to my house, I would invite you." And then he stopped. In contradistinction to his marvelous knowledge of law, he is reputed to be the best Shakspearean student alive in the three kingdoms. It is said he can repeat the plays verbatim. So that between the novels and the play, the law and his own sweet temper, Jonathan Christian is by no means an ordinary person. Spiteful people say he is mad; but no signs of failure have shown themselves as yet, and he is now well over sixty years of age.

The Honor of a Thief.—Mr. Serjeant Cox, in his book on the Principles of Punishment, relates the following anecdote: The honor of a thief is not always confined to his fellows: A striking instance of this occured once to myself. A man had been tried, convicted, and sentenced to six months' imprisonment for larceny. As he was leaving the dock a person spoke to him from the floor of the court, and he broke into a flood of tears. Seeing this, I called him back and inquired what it was grieved him. "Oh my lord!" he said, "I am told that my poor wife died in childbed last night from sorrow for me, and that I was not there to close her eyes." At once I resolved to trust him. "If you will give me your word that you will come here on the first day of next sessions to receive your punishment you shall go and bury your wife." Those about me were sure I should never see him again. "I put you upon your honor," I repeated, "I trust you." The promise was given. With expressions of extreme gratitude he left the court. At the next sessions great curiosity was felt as to the result of so uncommon, and as some thought unjustifiable experiment. But when the court met the convict appeared as he had promised, in mourning, saying, "I am come, as I promised, to take my sentence." After a moment's reflection I said, "You have behaved well—and so well that I shall not inflict upon you that sentence I had intended. In the hope that you will repent the past and be honest for the future, I will give you a chance to retrieve the character you have lost. You shall go on your own recognizance to come up for judgment when called on." I have been informed that he has profited by the lesson, and has since preserved an excellent character for honesty and industry.—*Ex.*

The Abolition of Capital Punishment in Maine.—The results of a year's experience of the abolition of the death penalty in Maine are not such as to give the opponents of capital punishment very much ground on which to found an argument in support of their ideas.

A correspondent of the New York *Nation*, writing from that State, gives some facts in relation to the abolishment of hanging which are calculated to strengthen the opinion that the fear of a criminal for his own life is the most deterring influence in preventing his taking the life of another. Maine was admitted into the the Union in 1820, and began its existence as a State with a capital-punishment law. In 1873 this law was amended, so as to leave its execution optional with the governor. The governor very rarely awarded the extreme penalty, and, as a consequence, murders increased to such an extent that "in 1860 Maine had become notorious for its murders." Nevertheless, from 1834 to 1864, a period of thirty years, not an execution took place in that State. "At length," says the writer, "a State-prison convict murdered his warden, and for this act, singularly enough, he was hung by Gov. Corry, as if the slaying of a prisoner's natural enemy were a more atrocious crime than the murdering of a wife or a friend. So illogical an enforcement of the capital law, of course, produced little effect, and murdering went on, until, in 1869, Gov. Chamberlain executed Harris, a negro, for the murder and rape of two old women. But his successor, Gov. Perham, refused to enforce the law, and capital crime soon proceeded more rapidly than ever, until, in 1875, the legislature passed an honest law, restoring the death-penalty without evasion, and in June of that year Wagner and Gordon were hung for the murder of five or six victims—men, women, and children." The effect of the new law and its strict enforcement is very striking. During the entire year following its passage, only one homicide occurred in Maine, and in that case the murderer committed suicide immediately after the commission of his crime. Yet, in the face of this, the legislature of 1876 abolished capital punishment, and the result of one year of the law of 1876 is even more striking than the effect of the passage of the law of 1875. Barely a year has elapsed since the last law was adopted, and, in that time, no less than eleven cruel and unnatural murders have been committed in the State. In addition to this, says the writer, "another alarming result of the abolition of the death-penalty has been a startling increase of high crimes not capital. During the year 1876, the number of our State-prison convicts has risen from 148 to 171, a gain of nearly 16 per cent.; and the last legislature, in February, was obliged to appro-

priate $15,000 towards an enlargement of the prison, although sixty-eight convicts had been removed from it to fill gaol workshops, built within the past three or four years, at a cost of over $60,000, to accommodate prisoners sentenced for not more than three years." Facts like these should be carefully studied by our legislators. They are of more value in the consideration of the advisability of capital punishment than any amount of false sentimentality or dangerous lenity, and point to the conclusion that the gallows cannot be abolished with safety to society.—*The Central Law Journal.*

The English Council of Law Reporting has issued a report for the past year, which shows results highly satisfactory, especially to the reporters, who get a bonus, in addition to their salaries, amounting to £959. The Digest positively realized the sum of £4,395 13*s.* 1 The profit on the whole year amounted to £5,768 2*s.* 2*d.* The reserve fund for "future contingencies" is now raised to £5,000. The *Law Times* says: "What these contingencies are we do not quite understand; and when the reporters have had a few more bonuses perhaps the council will think of the profession and reduce the annual subscription."—The *New Zealand Jurist* says that the first agreement for partition on record will be found in the 13th chapter of Genesis, where Abraham and Lot, being jointly seized in fee simple of the land round about Bethel, agreed to take certain portions of the country in severalty—Lot going one way and Abraham the other Supposing that they had taken the land as devisees with a right of survivorship, would it be possible to doubt that they intended to dispose of the contingent interest?

Crown Windfalls.—The following are extracts from a Blue-book (recently issued by a departmental committee of the Government, called the Legal Business Committee) which contains some interesting information on a subject of special moment to a good many people—viz., what becomes of the estates of intestates dying without known next of kin. Mr. F. Hart Dyke, the late Queen's Proctor, whose duties have recently been transferred to the Solicitor of the Treasury, when examined before the committee, deposed as follows:—I take out letters of administration, and get in all the money for the Government in connection with the estates of intestate bastards and *bona vacantia*. . . . I recommend the Lords of the Treasury as to the disposition of the balance of the effects. . . . The Solicitor to the Treasury is appointed administrator . . . I am known all over the world, and I correspond with solicitors and the people interested before they come to the Treasury. . . . I ascertain what the effects are either at the Bank of England or with various public bodies. . . . Mr. Stephenson gets in the effects. . . . Sometimes there are large and heavy pedigree cases. . . . In a heavy case, a short time ago, I fancied it was rather a fraudulent case on the part of the party who set up the claim. I got the facts together and took counsel's opinion. . . . I went on and won the case, and a large sum was recovered. . . . I have a lot of administrations going in shortly, and among there is one estate worth about 35,000*l.* Occasionally I have much heavier amounts even than that. . . . All these estates are vested in the Crown; they belong to Her Majesty in right of her royal prerogative. . . . There are doubts in some cases as to whether we should oppose a will or not . . . When bastards die there are always plenty of people only too ready to seize hold of their property and get wills made. Not very long ago I had two cases of this kind, but the law officers advised there was not sufficient evidence to justify proceedings. . . . In one case there was a commission to America. . . . It was an estate worth 70,000*l.*, I think. . . . In ordinary cases the course of procedure is this: I receive a letter stating A. B. is dead; that he had such and such property; that he was a bastard, or has left none but illegitimate relatives. Thereupon, I write a letter requesting further facts and particulars as to where the property is situated, what it amounts to, and so forth. . . . I find out who the next of kin are, or the persons to whom the Crown should make grants, and I recommend accordingly. . . . I do not know much about the real estate, because I have nothing to do with it. But, as regards the personal estate, the difficulty is to find out who are the next of kin. . . . In one special case I recommended the Government to sell the estates. . . . There were three or four farms in Hampshire worth 25,000*l.* or 30,000*l.* . . . I have got the money, and the residue will soon be divided. There was a very nice place down in the Isle of Wight. . . . I take out from forty to fifty administrations in a year. . . . Some are large amounts. . . . 120,000*l.* and sums of that sort. . . .

A perusal of the foregoing will show that it is possible for a good many wealthy people to pass out of existence *sans* known relatives. Three recent large 'Crown windfalls' occur to me: 250,000*l.*, Mrs. Mangin Brown, Chancery proceedings pending; 140,000*l.*, Mrs. Helen Blake, Chancery proceedings also pending; 40,000*l.*, Mr. Paterson, of Kilmarnock, as to whose estates a discussion has recently taken place in the House of Commons.—*English Law Journal.*

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Hilary Term, 40th Victoria.

During this Term, the following gentlemen were called to the Bar; the names are given in the order of merit.

Albert Clements Killam.
Thomas Hodgkin.
Cornelius J. O'Neil.
Francis Beverley Robertson.
Henry Ernest Henderson.
Hamilton Cassels.
Francis Love.
William Wyld.
Thomas Caswell.

The following gentlemen were called to the Bar under the rules for special cases framed under 39 Victoria, Chap. 3.

George Edmonson.
Frederick W. Colquhoun.
Edward O'Connor.
John Bergin.

The following gentlemen received Certificates of Fitness:

J. H. Madden.
H. Cassels.
J. W. Gordon.
J. Dowdall.
C. J. O'Neil.
T. M. Carthew.
T. J. Decatur.
T. D. Cowper.
A. W. Kinsman.
C. McK. Morrison.
C. Gordon.
F. S. O'Connor.
G. S. Hallen.

And the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:

Graduates.

Charles Augustus Kingston.
John Henry Long.
James J. Craig.
William Fletcher.
Leonard Harstone.
Patrick Anderson Macdonald.

Junior Class.

Benjamin Franklin Justin.
John F. Quinlan.
John Williams.
Joseph William MacDowell.
Phillip Henry Drayton.
Thomas A. Gorham.
James R. Brown.
George J. Sherry.
Hector McKay.
D. Henderson.
Alexander Carpenter Brazelev.
John Bertram Humphries.
Lauren G. Drew.
Herman Joseph Eberts.
Solomon George McGill.
David Johnson Lynch.
Thomas Henry Loscombe.
John Vashon May.
George Moir.
J. H. Macallum.
Hugo Schliefer.
David Robertson.
Angus McB. McKay.
Charles Rankin Gould.
William James Cooper.
Edward Stewart Tisdale.
Francis Melville Wakefield.
Alexander Stewart.
Thomas Miller White.
John Arthur Mowat.
Henry Bogart Dean.
George Robert Knight.
Humphrey Albert L. White.
John Wood.
George Benjamin Douglas.
Alexander Humphrey Macadam
Hugh Boulton Morphy.
William Henry Brouse.
George J. Gibb.
Frederick E. Redick.
William Masson.
Edward Guss Porter.
Thomas Robert Foy.
Henry Albert Rowe.
Thomas H. Stinson.
Stewart Masson.
Francis Evans Curtis.
William Stebbs.
Robert Taylor.
Henry M. East
Armour William Ford.

Wm. Martin McDermott.
Charles W. Phillips.
Wellington Snaill.
John Clyde Grant.
George Merrick Sinclair.
George Walker Marsh.
Edward Albert Foster.
Frank Russell Waddell.
Francis P. Conway.
Henry Dexter.
William T. Easton.
Albert Edward Wilkes.
James Lane.
John Henry Cooke.
Alexander Howden.
Douglas Buchanan.
John Alexander Stewart.
Arthur Mowat.
John McLean.
Robert Cockburn Hays.
William Aird Adair.
Ernest Wilbert Sexsmith.
John Baldwin Hand.
James Barrie.
George Frederick Jelfs.

Articled Clerks.

Noble A. Bartlett
Owen M. Jones.
Eugene Maurice Cole.
Ernest Arthur Hill Langtry.
John Oberlin Edwards.
J. A. Loughead.

Ordered, That the division of candidates for admission on the Books of the Society into three classe be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission as Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects:—

CLASSICS.

Xenophon Anabasis, B. I.; Homer, Iliad, B. I Cicero, for the Manilian Law; Ovid, Fasti, B. I., vv. 1 300; Virgil, Æneid, B. II., vv. 1-317; Translations from English into Latin; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of quadratic equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; An examination upon "The Lady of the Lake," with special reference to Cantos v. and vi.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar. Translation of simple sentences into French prose. Corneille, Horace, Acts I. and II.

or GERMAN.

A paper on Grammar. Musaeus, Stumme Liebe Schiller, Lied von der Glocke.

Candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), are required to pass a satisfactory examination in the following subjects:—

Ovid, Fasti, B. I., vv. 1-300,—or
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

A Student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk, (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

All examinations of Students-at-Law or Articled Clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

THOMAS HODGINS, *Chairman.*

Osgoode Hall, Trinity Term, 1876.

Adopted by the Benchers in Convocation August 29, 1876.

DIARY FOR SEPTEMBER.

1. Sat. ...Law Society Convocation meets.
2. SUN..14*th Sunday after Trinity.*
4. Tues..Napoleon III. deposed, 1870.
5. Wed..Lord Metcalfe, Gov.-General, died, 1846.
7. Fri....Sir George Simpson, H. B. Co., died 1860. Law Society Convocation meets.
8. Sat. ...Trinity term ends.
9. SUN..15*th Sunday after Trinity.*
11. Tues..General Sessions and County Court sittings for York.
12. Wed..Frontenac, Governor of Canada.
13. Thur..Quebec taken by British under General Wolfe, 1759.
14. Fri....Jacques Cartier arrived at Quebec, 1535.
16. SUN..16*th Sunday after Trinity.* Atlantic cable opened, 1858.
17. Mon..First Upper Canada Parliament met at Niagara, 1792.
19. Wed..Lord Sydenham, Gov.-General, died, 1841.
23. SUN..17*th Sunday after Trinity.*
24. Mon..Guy Carleton, Lieut.-Governor and Commander in-Chief, 1766.
30. SUN..18*th Sunday after Trinity.* Sir I. Brock, Pres., 1811.

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THE

Canada Law Journal.

Toronto, September, 1877.

Questions very often arise before special examiners as to the powers they possess of excluding persons who wish to be present at the examinations. In *In re Western of Canada Oil Lands, &c. Company*, 25 W. R. 787, the Master of the Rolls held that the examiner's office is simply a private room, and that he has no discretion to admit any persons other than the parties, their solicitors, counsel, and agents.

We commend the action of the Court of Chancery in extending vacation to the end of August. This gives a two months pause during the summer when fagged brains and bodies can rest and recruit. It might be well, however, to change the time so that vacation would generally include the hot weather, say from the middle of July till the middle of September. This would somewhat disarrange the fall circuits, but with the present conveniences for travel, there is no good reason why some of this business should not be attended to during the winter months.

A FEW MORE WORDS ON DOWER.

Our correspondent, E. D. A., in his excellent letter published in our last number is quite correct in his reading of *Acre* v. *Livingstone*. That case is not so much of consequence upon the question of the interest of the widow before assignment of dower, as upon the legal operation and effect of a "quit-claim" deed. Our position in the article referred to was that the widow had no legal estate before assign-

ment, and we did not intend to intimate that the law was unsettled on that point.

But we return to the subject of dower not so much for the sake of setting right what might be left to right itself as to call attention to the fact that the case of *Dawson* v. *Bank of Whitehaven*, L. R. 4 Ch. D. 639, has been reversed by a very strong Court of Appeal, consisting of Jessel, M.R., and James and Cotton, L.JJ. The Court of Appeal held that when the widow bars her dower in a mortgage made by the husband for his own benefit, her right to dower is absolutely gone at law, and that, as in England, no dower attaches to an equitable estate; and, as she has voluntarily concurred in changing the husband's estate from a legal to an equitable one, she has no equity to claim dower after the satisfaction of the mortgage out of the lands so pledged. The Court of Appeal also dealt with the argument that the wife became a surety for the debt, and that therefore when the debt was paid she became entitled to the benefit of the security obtained by the creditor from the husband, the principal debtor. It was answered that as the wife's right was extinguished she did not pledge any estate for her husband's debt, nor did she make herself personally liable for it. The full text of the appellate decision is not yet published, and we have but seen a note of it in 21 Sol. J. 749. It may be that the Consolidated Statute giving the widow dower in an equitable estate of which the husband dies seized will render some of the reasoning of the judges in appeal inapplicable to the circumstances of this country. But of this it would be premature to speak, till the decision is properly reported at length.

THE COURT OF APPEAL UPON THE ADMINISTRATION OF JUSTICE ACT.

The Court of Appeal, (consisting of Hagarty, C.J. C.P., and Burton, Patterson, and Moss, JJ.), have in the case of *St. Michael's College* v. *Merrick*, expressed a unanimous opinion upon the construction of the Administration of Justice Act of 1873. In substance that opinion accords with the views which have from time to time been expressed in the pages of this journal. The Court hold that that Act was not intended to abrogate any of the former jurisdiction of the Court of Chancery—that its provisions are permissive and not compulsory—and that consequently a line of decisions to the contrary is no longer to be regarded as law. The excellent service rendered by the Court of Appeal in *Davidson* v. *Ross*, in dissipating the subtleties of the doctrine of pressure in cases of fraudulent preference, has been substantially repeated in clearing away the jungle of perplexity which was over-running the sections of this Act.

A person sued who has an equitable defence may now, as before the statute, elect to set up his defence at law, or may file a bill to restrain the action at law on equitable grounds. But it is held that when once judgment is recovered, that is conclusive, not only as to legal, but as to equitable defences which either were raised, or might have been raised, in the particular action. Whether the Court of Appeal intend this to apply to actions of ejectment is not plainly expressed. If so the case of *Demorest* v. *Helms*, 22 Gr. 433, still is law, a conclusion which we are very loth to accept. But it is quiet clear that among the decisions overruled by this judgment are the cases of *McCabe* v. *Wragg*, 21 Gr. 97, and *French* v. *Taylor*, 23 Gr. 436, while the *ratio decidendi* in *Henderson* v. *Watson*, 23 Gr. 355, and

Victoria Insurance Company v. *Bethune*, ib. 569, cannot be any longer supported. Nor can the case of *Kennedy* v. *Rown*, 21 Gr. 95, be considered as an authority, especially when taken in connection with the reasoning in *Falls* v. *Powell*, 20 Gr. 461.

The Court of Appeal further hold that after judgment is recovered at law, it is optional with the plaintiff, who seeks equitable execution or the like, to proceed summarily in the action, or to file a bill in equity as aforetime. This strikes at the authority of *Knox* v. *Travers*, 23 Gr. 91, and renders *Sawyers* v. *Linton*, ib. 43, an unnecessary, as it has always been an unsatisfactory, decision.

We are satisfied that the Court of Appeal have given the true interpretation to this much canvassed statute. By making the Act permissive, the Court do not give license to additional litigation, but only sanction it where it is more convenient that the equitable rights of the parties should be determined by plenary suit in Chancery, than by comprehending them in a suit at law. There is always the power to punish the unnecessary commencement of a suit by the provisions of the 48th section, whereby costs may be diminished to the quantum allowed in the least expensive forum, and a set off may be directed of the additional costs incurred by the adversary.

As we understand the judgment of the Court of Appeal, that Court is disposed to limit the rights to add third persons as parties to cases where these strangers are interested in the questions arising in the suit between the parties thereto. But the section of the statute relating to this matter (sec. 8) is not very fully or explicitly dealt with. Questions of serious difficulty arise as to the scope of the language used; and the decisions in England upon analogous provisions of the Judicature Act are remarkable for the divergence of judicial opinion presented therein.

DIVISION COURTS.

There has lately been sent to us a report of the Inspector of the Division Courts in Ontario, laid before the Local Legislature last session. Though rather late in coming to hand, we purpose noticing a few of the items of interest to the general reader to be found in it.

The chief information it gives is that shewing the amount of business done in the Division Courts of this Province for six months of the year past, commencing 1st of May. A table shews the number of suits entered during that period in each County (with the exception of a few Courts from which no returns had been received), and the amount of claims involved in these suits.

By taking the average to supply the missing returns, we are able to arrive at a fair estimate of the year's work in these Courts. To do this, however, we have to double the figures given for the six months, and as those six months are the Summer ones, it will be evident that our estimate must be, if anything, below the mark, inasmuch as more work is done in those Courts, as in all others, during the Winter months.

A few words, to premise, before we come to figures: The number of Counties and united Counties in Ontario is 36, exclusive of Districts, which do not enter into the present calculation. The number of Division Courts in these 36 Counties is 270; or, an average of nearly 8 to each County. The actual number in each County varies from four to twelve (the highest number allowed by the Act). In seventeen Counties the number of Courts is above the average, in the remaining nineteen, the number is below the average. In five Counties only is the full number of twelve established.

Taking now the figures in Mr. Dickey's report, and allowing for the Courts from which no returns have been obtained, we

arrive at the following results for the above six months :

Total number of suits entered	38,250
Total amount of claims therein	$1,125,404

Doubling these we get for the *year*.

Number of suits entered	76,500
Amount of claims involved	$2,250,808

From these figures we adduce the following :

Average number of suits for each County	2,125
" " " Court	283
" amount of claims for each County	$62,523
" " " Court	8,337

In sixteen Counties the number of suits is above the average (2125), ranging from 5550 down to 2152.

In the remaining twenty, the number is below the average, ranging from 1976 down to 562.

In twelve counties, the total of claims involved is above the average ($62,523) varying from $209,350, down to $64,868.

In twenty-four Counties, the total claims is below the average, ranging from $59,686 down to $20,352.

While the average number of suits in each County is 2125, and the average of claims involved $62,523, we see in one County as many as 5550 suits entered, claims to the extent of $209,850 ; in another, only 562 suits, for $20,352.

These are the extremes ; still the contrast is very great, even if we take, say, the highest three and the lowest three Counties, which are :

York	5550 suits.	—Claims	$209,850
Simcoe	4976 "	"	149,730
Northumberland and Durham	3516 "	"	110,394
Prince Edward	904 suits.	—Claims	$22,970
Carleton	866 "	"	25,670
Peel	562 "	"	20,852

Our own County (York) stands, of course, at the head of the list, containing, as it does, the City of Toronto with upwards of 70,000 inhabitants, but, while it heads Simcoe, the second on the list, by less than 600 suits, we are surprised to find that County (Simcoe) with nearly 1500 more than the next below it on the list.

We see then, that even at the very lowest calculation, claims to the extent of at least *two and a quarter millions of dollars* are adjudicated upon in the Ontario Division Courts during the year. So much for figures.

On glancing at the report we find allusion made by the Inspector to the question of the differences in the taxation of costs existing between some of the Clerks of these Courts. Uniformity and certainty are very much to be desired ; but while a tariff of fees has been prepared by authority, there must of course be cases where questions of cost come up, for which no provision is made. In such cases, as well as in all others, there is an appeal to the Judge, and if, as we understand is the case, constant correspondence and communication is taking place between the County Judges, as well by letter as at their annual meeting in June, on all questions affecting the practice and conduct of their Courts, there is no doubt that in a short time, uniformity and certainty will be secured. The Inspector alludes to the "self-interest" of the Clerks in these matters as interfering with their understanding of the tariff, but where, we ask, is it otherwise, where officials are paid by fees and not by salary? The same accusation might be made against Sheriffs, the Clerks of the higher Courts, Bailiffs, &c., and it amounts simply to a charge of giving themselves the "benefit of the doubt." Every day, with each of these officials, a case arises where something or other has to be done for which no renumeration is provided.

The fact is that the remarks of the Inspector point to this, that the system of payment by fees is a most pernicious one, and the sooner it is done away with the better for all parties. No doubt the payment of all Division Court Clerks, for instance, by a uniform salary, would

be inequitable, but the end might be accomplished by making the salary dependent either upon the number of suits entered, or upon the amount of claims involved.

On page three of the Report, we find the Inspector saying, "When judgment has been rendered against the primary debtor and garnishee at the same sittings, and in the same minute of judgment, two fees have been taxed as for separate judgments, when in fact there is only one judgment of the Court * * *These practices are contrary to law, and are disallowed by me."

By the expression "contrary to law," we presume is meant, unauthorized by the practice. The Inspector's opinion on this point, however, is, as we are informed, at variance with that of some of the older and more experienced County Judges who have, since the Garnishee Act was passed, directed and sanctioned the contrary practice. Looking cursorily at it, we fail to see how a decision between the primary creditor and primary debtor, whose dispute may be about a horse, has anything to do with that between the primary debtor and the garnishee, the latter being charged as owing the former for a cow. As a fact, we are informed that in some counties, the two decisions are rarely, if ever, given at the same sittings — the primary creditor being seldom prepared to prove the indebtedness of the garnishee, relying on his not denying it, or on his paying money into Court. In such a case, that is, when an adjournment takes place as to the garnishee, the two decisions clearly do not make one judgment; that against the primary debtor is complete in itself, and becomes a judgment at once. Why then should the contrary be the case merely because the two decisions are given at different times on the same day, instead of on different days. A decision on a claim against a primary debtor, pronounced in open Court, becomes at once a judgment. And it seems to us most unlikely that a judge should delay in pronouncing judgment against a primary debtor, until he ascertained whether a third party were indebted to him. It is only where he does so, that the case could possibly come within the words used by the Inspector "in the same minute of judgment," which may be another way of saying, "in the one adjudication."

If the two make *one judgment*, how about the separate executions which it may be necessary to issue at the same time? and if the plaintiff is nonsuited as against the garnishee, but recover against the primary debtor, in whose favour could the judgment be said to be? The case is unlike that where several issues between the same parties are decided differently. Again it is competent for the Judge, as against *one* party only, to set aside the judgment and make an order for a new trial, or for a nonsuit, leaving the other part of the adjudication intact; this also points strongly to the view that there can be two judgments resulting from the complex procedure under the garnishing clauses of the act.

SELECTIONS.

CURIOSITIES OF ENGLISH LAW.

CONDITIONS IN RESTRAINT OF MARRIAGE.

We now propose to review a branch of the law which, if it were on no other account open to comment, would be abundantly worthy of notice as having given rise to a most remarkable rule of Construction.

This rule of construction, commonly known as the doctrine of conditions *in terrorem*, may be shortly stated as follows:—Where a testator attaches to his bounty a condition of forfeiture on marriage, the Court often refuses to construe his words according to their natural meaning, and holds that he did not really

intend the threatened forfeiture to take effect, but only inserted the condition in the hope that the legatee by taking an erroneous view of his intentions might be intimidated into remaining single.

We believe no one has succeeded in discovering when this doctrine which traces its origin to the Civil Law first became naturalized in this country. Like the family of Douglas, there never seems to have been a time when it did not flourish. We never come across it in an embryo state; on the very first introduction we are presented to it in a high state of development as an incontestible dogma. Yet so long ago as the leading case of *Scott* v. *Tyler*, it was spoken of very disrespectfully both by the judge and by some of the principal counsel of the day, and since that time its position has by no means improved.

It is no doubt a matter of congratulation that the Judges have, in this instance, been content simply to perpetuate a time-honoured doctrine which has been universally condemned for a century, and have not thought it necessary (as is often the case) to add to the sanction of antiquity the weight of their own approbation. The vigorous assaults on the part of the highest functionaries of the law to which this devoted doctrine has been subjected, certainly affords a gratifying spectacle of judicial independence. Lord Thurlow in *Scott* v. *Tyler*, after referring to some early cases, observes, "I do not find it was ever seriously supposed to have been the testator's intention to hold out the terror of that which he never meant should happen,"* and for a modern exposition of judicial opinion on the doctrine, it will be sufficient to refer to the judgment of Jessel, M. R., in *Bellairs* v. *Bellairs* (L.R. 18, Eq. 510), in which he follows the current of authority with extreme reluctance. Satisfactory as it is to find that the undisguised opinion of the Judges is in this instance not opposed to the plain dictates of common sense, we may well feel some little disappointment when we reflect that a doctrine, on the face of it utterly absurd, which has been energetically condemned by the highest legal authority nearly a century ago, should still be permitted to flourish in undiminished vigour. The vitality of legal abuses must indeed be great, if such a one as this can escape the raid of Law Reformers uninjured. Without a friend in the world, planted no one knows how or why, it exists simply because it has existed. Possibly like the reed in the fable, its very weakness constitutes its strength. There is, it may be, a kind of chivalrous feeling in the breasts of Law Reformers, impelling them "*parcere subjectis et debellare superbos*," that is, to spare the small game, and direct their attacks at those large and terrible abuses which have influential defenders and die hard. We know that the satisfaction arising from the successful issue of an enterprise, depends principally upon a sense of the difficulties which have had to be surmounted, and we can quite understand that the feeling of triumph, to say nothing of an increased meed of popular applause, occasioned by a hotly-contested victory, affords a much keener source of gratification to the victor than the discomfiture of a feeble enemy.

A rat-catcher may be more usefully employed than a lion-hunter, but his occupation is not held in the same estimation. In this respect, the Law Reformer is no exception to the general rule. He feels as keen a delight as any other naturally combative person in meeting "a foeman worthy of his steel." To fight the powers that be, to try a fall with the Attorney and Solicitor-General, to brave the invectives of the Lord Chancellor, and the contemptuous sneers of the senior members of the Bar—this is indeed an inspiriting contest, defeat is no dishonour and victory inexpressibly glorious. How humble in comparison is the position of the mere Scavenger of Reform, he who quietly removes a nuisance the retention of which is a matter of indifference to the highest legal authorities. Too many of us aim rather at being famous than useful, and hence we can understand how it happens that an abuse may owe its vitality to the mere fact that it is too utterly rotten for any human being to defend, and we venture to think that no better illustration of the truth of this paradox can be found than in the continued existence of the Doctrine of Conditions *in terrorem*.

Having once firmly established the doc-

* See also the observations of Lord Mansfield, in *Long* v. *Dennis*, 4 Burr 2055.

trine that persons are in the habit of endeavouring to regulate the conduct of their legatees by purporting to impose penalties which they do not intend to be enforced, and which those legatees may discover from the nearest attorney to be a mere dead letter, it may be a question whether the judges might not, with advantage, have abandoned altogether the transparent pretext of trying to discover the real intention of the testator. The solution they arrived at as to the meaning of the testator's words being, in most cases, obviously opposed to common sense, one would scarcely have thought it worth their while by refining on their canons of construction to render that solution more difficult to forecast. However, various refinements have, as we all know, been engrafted on the primitive doctrine until the decisions of the Court have become extremely difficult to forecast. First a distinction has been taken between those cases in which a testator has merely declared that an interest given to a person shall cease on marriage, without any direction as to the disposition of the fund in that event, and those cases in which there is an express bequest over of the forfeited interest. The judicial mind has been much exercised as to the ground of this distinction. Sir William Grant, M.R., in *Lloyd* v. *Pranton* (3 Mer. 117), observed, "Different reasons have been assigned by different Judges for the operation of a devise over. Some have said that it afforded a clear manifestation of the intention of the testator not to make the declaration of the forfeiture merely *in terrorem*, which might otherwise have been presumed. Others have said that it was the interest of the devisee over which made the difference, and that the clause ceased to be merely a condition of forfeiture, and became a conditional limitation, to which the Court was bound to give effect."

We do not propose to comment on the judicial doubts as to this knotty point; it will be sufficient to observe that the distinction in question, whatever may be its origin, or on whatever grounds it may be upheld, has, in its application, given rise to a good deal of litigation, owing to a difference of opinion among the Judges as to whether or not a residuary bequest amounts to a sufficient bequest over to oust the *in terrorem* doctrine. Sir William Grant in the last-mentioned case, without venturing to give a positive opinion as to the effect of a simple residuary bequest, decided that a direction that the forfeited bequests should fall into the residue was as effectual as an express bequest over, and although the better opinion would seem to be that a simple residuary bequest does not amount to a bequest over, the point can hardly be said to be free from doubt.

We see then that the first limitation placed to the doctrine of conditions *in terrorem* has given rise to a doubt that is still *sub judice*.

The effect of an alternative bequest has also furnished abundant matter for controversy. If the Judges had been actuated by any *bonâ fide* desires to carry the wishes of testators into effect, it is difficult to see on what ground they should have refused to an alternative bequest the same weight as an indication of intention which they accorded to a bequest over. If a man is held to have sufficiently expressed an intention to enforce the threatened terrors of forfeiture by indicating the objects of his bounty in the event of his forfeiture taking effect, surely his intention not to rely upon any idle threat remains equally manifest if he takes the trouble to make out an alternative scheme, and, instead of naming other objects of his bounty, proceeds to apportion the relative wages of obedience and contumacy. However, it was settled by Lord Hardwicke (*Wheeler* v. *Bingham*, 3 Atk. 364), that an alternative provision in the event of non-compliance with the conditions of celibacy, on which the original bequest was granted, whether such alternative provision was settled by the testator himself, or left to the discretion of others, was not sufficient to oust the doctrine of *in terrorem*. But although the authority of that decision has, we believe, never been questioned, nevertheless it would be wrong to infer that the insertion of an alternative bequest may be left out of consideration in determining the effect to be attributed to a clause of forfeiture. Such a bequest may produce, in a different way, precisely the same effect, as regards the threatened legatee, as a bequest over may. Sometimes it will be efficacious to his detriment when a bequest over would have been innocuous, for the tendency of modern decisions has been

to consider alternative bequests in the light of *limitations* (which are valid even when in *general* restraint of marriage) rather than conditions. These cases on this head (which contain extremely thin distinctions, and are very difficult to reconcile) we will refrain from discussing until we come to consider the question of limitations as distinguished from conditions.

We have said quite enough to show that the *in terrorem* doctrine has occasioned a great deal of doubt and difficulty, but the most perplexing question of all in relation to that doctrine has still to be investigated, namely, whether the doctrine does or does not apply to conditions precedent. In the first place, it is sometimes by no means an easy matter to distinguish a condition precedent from a condition subsequent. We find it stated in a very early case (*Robinson* v. *Comyns*, Ca. Temp. Talbot, 166), that "There are no technical words to distinguish conditions precedent and subsequent, but the same words may indifferently make either, according to the intent of the person who creates it." After this not very encouraging announcement, it is not surprising to find that a large proportion of the cases on Conditions in Restraint of Marriage, contain more or less elaborate arguments, with the object of showing that what would appear *primâ facie* to be a condition precedent, is really a condition subsequent, and *vice versa*. At first sight, the distinction between the two classes of condition seems both simple and substantial. The one class we are told, operates by way of raising an interest, the other by adeeming a benefit already confirmed. In practice, however, it was soon discovered that the distinction was anything but simple, and still less can it be said to be substantial. In fact, we do not hesitate to record our conviction that this distinction is, with regard to the subject under discussion, as vicious as it is perplexing. If we inquire into the probable reasons which determine a testator in his choice between the two classes of conditions, it will in most instances clearly appear that he was actuated by motives which have no bearing whatever on the question of whether or not he wished his conditions to be enforced. It is a mistake to suppose (as the Judges seem to do) that a testator puts a prohibition or injunction, in the form of a condition subsequent, when he is comparatively indifferent as to whether his wishes are attended to or not, and in the form of a condition precedent, only when he is really anxious to be obeyed, this is not so; he makes use of the one form or the other, for no other reason than because in the state of circumstances that he has to deal with, it happens to afford the simplest expression of his wishes. Suppose, for instance, that a testator simply desires to make a provision for his daughter *on her marriage with her mother's consent*, in such a case, he would naturally carry his intention into effect through the medium of a condition precedent, if, on the other hand, he wishes to make the provision in favour of his daughter to take effect *immediately* after his death, he will probably leave an annuity to his daughter, with the condition that it shall cease or go over if she marries without her mother's consent. This is of course a condition subsequent, but it cannot be supposed that the testator is less anxious in the one case than in the other to prevent his daughter from making an imprudent match. Yet the form of expression may be of the utmost importance, for there is a good deal of authority for the proposition that the doctrine of *in terrorem* applies exclusively to conditions subsequent. However, this is a doubtful point, and may, perhaps, even yet occasion plenty of litigation before it is finally settled.

We have now only one more modification of the *in terrorem* doctrine to deal with: This last modification, while more palpably absurd than any we have hither to discussed, has the great advantage of simplicity. It has been gravely decided that the intention of a testator varies according to the nature of the property with which he purports to deal, and that the very same words which, if he were dealing with personal estate, would be held inoperative to defeat a previous gift, will, if referable to real estate, effectually put an end to the interest of the devisee. This remarkable distinction, and that between conditions precedent and subsequent, experienced rough treatment at the hands of Lord Rosslyn, in the well-known case of *Stackpole* v. *Beaumont*.

His Lordship observes (3 Ves. 95), "It is impossible to reconcile the authorites, or range them under one sensible, plain, general rule. There can be no ground in the construction of legacies for a distinction between legacies out of personal and out of real estate. The construction ought to be precisely the same. I do not see more importance in reality in the distinction between conditions precedent and subsequent. The case of all these questions is plainly this: In deciding questions that arise upon legacies out of land, the Court very properly followed the rule that the Common Law prescribes, and common sense supports, to hold the condition binding where it is not illegal. Where it is illegal the condition would be rejected, and the gift pure. When the rule came to be applied to personal estate, the Court felt the difficulty, upon the supposition that the Ecclesiastical Court had adopted a positive rule from the Civil Law upon legatory questions, and the inconvenience of preceding by a different rule in the concurrent jurisdiction (it is not right to call it so), in the resort to this Court instead of the Ecclesiastical Court upon legatory questions, which, after the Restoration, was very frequent, in the beginning embarrassed the Court. Distinction upon distinction was taken to get out of the supposed difficulty." His Lordship then proceeds, in no measured terms, to condemn the folly of importing the rules of the Civil Law into the Ecclesiastical Courts,* and ended by observing, "the authorities stand so well ranged that the Court would not appear to act too boldly whichever side of the proposition they should adopt."

With regard to the rival merits or demerits of the Civil and the Common Law, we do not hold so decided an opinion as Lord Rosslyn. On the contrary, we have every desire to encourage the spirit of compromise. We do not, we confess, entertain such an exalted opinion of the excellence of the Canon Law or the Common Law as to regard the complete triumph of either system in the light of a highly desirable event. We think that either system might, with advantage, accept of modification from the other, but we are unable to adopt the rough and ready form of compromise instituted by the Judges as a satisfactory settlement of their relative claims. It would, we humbly conceive, have been preferable to amalgamate the two systems of Law instead of allowing each of them to exercise more or less undisputed sway in its own allotted domain. Indeed, we venture to submit that almost anything would have been better than the present ludicrous anomaly of construing different passages in the same will according to antagonistic rules of construction. By whatever legal subtleties such a result may be defended, we are afraid that to the lay mind it will always appear strange that a condition in one part of a will should be interpreted to mean something quite different from an identically similar condition in another part. This result does not seem to have been brought about by reason of any overweening regard on the part of the Chancellors for the sanctity of every jot and title of the Canon Law; on the contrary, on the partial adoption of that Law they did not scruple to introduce amendments of their own, some of which we cannot conscientiously designate as imdesignate as improvements. For instance, the Canon Law recognised no distinction between conditions subsequent and precedent in restraint of marriage, and attached no importance to the circumstance of a bequest over, two very considerable variations from the doctrine of the Court of Chancery. Although, therefore, we are inclined to agree with Lord Rosslyn in thinking that the Chancellors felt themselves, in some degree, hampered and embarrassed by the concurrent jurisdiction in the matter of legacies assumed by the Ecclesiastical Courts; still, in the face of the wide differences which were permitted to continue, we suspect that the concessions made on their part were not such as they regarded with any great aversion. We are strongly of opinion that the different construction of conditions, according as they affect gifts of realty or personality, may be explained without having recourse to the supposition of undue clerical influence. A devisee stands on quite a different footing in the estimation of the Court of Chancery from a legatee. While legacies affect only the next-of-kin, devises are in-

* It is remarkable that his Lordship, while praising the Common Law and condemning the Canon Law, should have found fault with the distinction between condition precedent and subsequent, which is a creature of the Common Law.

jurious to the sacred interests of the heir-at-law. Now between a testator's legatees and his next-of-kin Equity is content to hold a pretty even balance, the claims of the next-of-kin not being invested with any peculiar sanctity, whilst the heir-at-law has always been pre-eminently what is called "a favourite" with the Court. Any interference with the prospects of that favoured individual, who has the divine right of primogeniture on his side, is jealously watched, and, indeed, the measure of favour dealt out to him was so extravagant, and so obviously inconsistent with a just estimate of the rival claims, both of creditors and of next-to-kin, that the Legislature had to interfere and enforce (in spite of strenuous opposition on the part of the highest legal functionaries) the elementary principles of justice; 1st. By making the heir liable to the extent of his inheritance for all the debts of his ancestor; and, 2ndly. By forbidding him to come upon the next-of-kin to pay off out of personalty the mortgages and charges to which his inheritance had been subjected. The heir-at-law then and the next of kin stand at the opposite ends of the scale of favouritism. Starting from this premise we may deduce the relative positions of legatee and devisee. In so far as their respective interests do not clash with those of the heir, the devisee is the more favoured of the two. He holds a very strong position when put in competition with such unconsidered persons as legatees and next-of-kin, but in so far as he ousts the heir he is considered in the light of a usurper, and the Court is only too glad of any excuse for holding a devise to be inoperative, and so reinstating their favourite the heir.

But whatever may have been the original motive for construing conditions attaches to devises more strictly than conditions attaches to legacies, whether partiality for the heir or regard for the Canon Law; at the present time there is not a shadow of excuse for making rules of construction vary according to the nature of the property given. If the doctrine of conditions *in terrorem* is held to furnish the rules of construction best calculated to carry a testator's real wishes into effect, the doctrine should manifestly be applied to devises as well as legacies.

It may be observed that even this last-mentioned limitation of the famous doctrine, comparativaly simple as it is, has given rise to questions of some difficulty. It has only just been decided, and we venture to doubt whether it has been finally settled, by the present Master of the Rolls (*Bellairs* v. *Bellairs*, L. R. 18 Eq. 510), that a mixed fund of realty and personalty follows the rule of personalty, and in the same case it was intimated, but not expressly decided, that proceeds of sale of realty follow the same rule.

We have said enough to give some idea of the absurd and perplexing nature of the law of conditions *in terrorem*. We must not forget that a complete knowledge of that branch of the law, so far as it has been settled is but a small part of the qualification necessary for deciding on the validity of conditions in restraint of marriage. We have but put aside all the judically collected rubbish which impedes us at the threshold of our inquiry. We have learnt only to decide under what circumstances a testator shall be presumed to have meant what he has said, and it remains to be seen how far the law will permit his intentions when discovered by the canons of construction already noticed, to be carried into effect.

It is not every condition in restraint of marriage that is illegal. If a condition is what Equity considers reasonable, it has some chance of being enforced. The delicate task of discriminating between reasonable and unreasonable conditions, has, of course, afforded abundant opportunity for the display of differences of opinion among the Judges. On the whole, however, we do not think that the conclusions arrived at are, as a rule, sufficiently remarkable either for their sagacity or the reverse, to be of any great value, whether by way of example or warning; we do not propose, therefore, to dwell at length on this division of our subject, but only to mention shortly some few decisions which seem especially open to comment.

In the first place, Equity shows no indulgence to second marriages under any circumstances whatever. Widow or widower, young or old, childless or otherwise, Equity sees no reason why any one should not be debarred from marrying again under any pain of pecuniary loss.

This result seems to have been arrived at by easy stages. It was very early decided that a testator might reasonably hold out a pecuniary inducement to his widow to remain faithful to his memory, whether she had any children by him or not, and there is some authority in the early cases for supposing that sons had the like power of throwing obstacles in the way of the second marriage of their mother. It was, however, reserved for Lord Hatherly, when Vice-Chancellor, and the Court of Appeal, in the Chancery Division, to advance the doctrine as to second marriage by two important stages. Lord Hatherley (*Newton* v. *Marsden*, 2 J. & H., 356, 31 L.J. Ch. 690) in a very long and elaborate judgment, decided on the balance of authority, that any one may impede the marriage of a widow to the same extent as her late husband, and it has quite recently been held by the Court of Appeal *Allen* v. *Jackson*, 1 Ch. Div., 399), reversing the decision of Vice-Chancellor Hall, that the second marriage of a widower is not more favoured than that of a widow. In the entire want of sympathy with second marriages evinced by the the Judges, they are not altogether in accord with the Civil Law, which only countenanced restraints on second marriage where the interests of the children of the former marriage might be affected. We confess that, in our opinion, the ancient law might have been followed with advantage. It seems a little hard that persons whose first marriage has not been attended with the natural result should be restrained from contracting a second, particularly, as a learned Judge pathetically observed, where the surviving party is still of an age to do good service to the State by the procreation of children. We are aware that there exists some diversity of opinion with regard to the precise degree of merit attaching to such a service, but without entering into that delicate inquiry, it is enough for us to suggest that most of the objections to the marriage of childless widows and widowers apply equally to first marriages.

The Court does not look with any disfavour upon conditions restraining marriage without consent where such conditions are deemed reasonable, and the judges have felt no difficulty in upholding the validity of conditions whether precedent or subsequent requiring the consent of trustees to the marriage of a legatee under age, indeed it has been held by the Lords Justices (*Younge* v. *Furse*, 8 D. M. & G., 756), that a testator may legally declare a forfeiture upon the marriage of his daughter (and we presume of any other woman), *with or without consent*, under the age of 28. This seems a strong decision, and under the circumstances, the testator having himself, shortly before he died, consented to the proposals of the young gentleman, subject only to his daughter's approval, it was particularly hard on the legatee. Even in the absence of any special element of hardship, we think a condition prohibiting the marriage of a woman under 28 can scarcely in fairness be called a reasonable condition. We can quite understand that to elderly gentlemen like the Lords Justices, who were perhaps at the age of 28, only in the first struggles of their professional career, that age should savour of extreme youth, but they should remember that girls are commonly placed in the way of receiving proposals of marriage at the age of 17 or 18, and that to prolong for ten years the inconveniences of an engagement when they might at once be put an end to by the nearest parson, much to the satisfaction of all parties, is indeed a serious responsibility.

But although a testator may prohibit his daughter, under pain of pecuniary penalties, from marrying under the age of 28 at his own absolute discretion without giving any reason whatever, it would appear from the case of *Morley* v. *Rennoldson*, 2 Hare, 579, that he might not altogether prohibit her from marrying even though he gives what most people would consider a good reason for the prohibition. In that case the testator purported to prohibit his daughter from marrying on the ground that she was suffering from nervous debility, which totally unfitted her for the control of herself, nevertheless the prohibition was held to be void. The evidence indeed went to show that the testator was mistaken in his estimate in his daughter's state of health, but the judgement of Vice-Chancellor Wigram goes the length of affirming that nothing short of an absolute incapacity to contract marriage, such as would in itself suffice to render the ceremony void, justifies a condition in general restraint of marriage. Our sympathy in this case is with the tes-

tator rather than his daughter, but in general the former has much the best of it. Not only is he permitted, and even encouraged, to hinder a woman from marrying any specified individual whom he may happen to dislike, but the law actually considers it reasonable that he should be empowered to impose a husband of his own choice as the price of enjoying his bounty. When not to marry A. B. is considered a punishable offence, we may conceive with what severity the crime of insisting upon marriage with C. D. is regarded by the judges. Lord Chancellor King (*Jarvis* v. *Duke*, 1 Vern. 19), waxed very eloquent on the "presumtuous disobedience" of such conduct, and observed that the delinquent highly merited her punishment "she being only prohibited to marry with one man by name and nothing in the whole fair Garden of Eden would serve her turn, but this forbidden fruit." The judges have experienced great difficulty in dealing with those cases where a testator has made his bounty dependent on marriage with consent, without limiting any time after which the legatee may marry without consent. Here the most refined distinctions have been taken, and the authorities are in a chaotic state of confusion. It is not only that all the before-mentioned inquiries may have to be made, 1st as to the nature of the property in dispute, whether realty, personalty, proceeds of sale of realty, or a mixed fund, 2ndly as to the nature of the condition whether precedent or subsequent, 3rdly as to whether there is a gift over, or 4thly an alternative gift—on every one of which points very difficult questions may arise—it is not only that a definite answer has, if possible, to be obtained to some, or perhaps, all of these perplexing inquiries, but that when the required results have with infinite labour been worked out, it often happens that the law applicable to them is involved in so much doubt, and the authorities are so confused and contradictory as to justify the Court in pronouncing a decree for either party it pleases.

The cases on gifts of land, and legacies charged on land, are particularly unsatisfactory and hard to reconcile. We have seen that in the construction of such gifts the doctrine of *in terrorem* does not apply. This seems to be the only distinction established beyond all dispute. We seek in vain to discover from the authorities how far, or in what respects, the Law as to conditions in restraint of marriage annexed to gifts of realty differs from the Law relating to legacies out of personality where there is a gift over, so as to eliminte the *in terrorem* factor of the problem, or even whether there is any difference at all. It has often been said that conditions precedent annexed to devises must be scrupulously complied with in order to raise the estate, either leaving it to be inferred, or sometimes expressly stating* that conditional bequests of personality stand on a different footing; we are, however, unable to gather from the cases, taken collectively, in what the difference, if there be any, consists, and we doubt very much whether a condition precedent in restraint of marriage could be framed so as to be valid if annexed to reality, and void, notwithstanding a gift over, if annexed to personality. In whatever way the Law may be finally settled, as regards conditions precedent, up to a very recent time we considered there could be no reasonable doubt as to one feature, at least of the Law applicable to condition subsequent. We used to be clearly of opinion that if any proposition of Law or Equity could be considered to be established beyond all controversy, it was the proposition that conditions subsequent in general restraint of marriage are altogether void, whether annexed to devises of realty or to bequests of personalty. What then was our astonishment when we found that six very learned counsel had recently succeeded in convincing (*Bellairs* v. *Bellairs*, L. R. 18 Eq., 510), no less eminent a Judge than the the present Master of the Rolls that a condition in general restraint of marriage, whether precedent or subsequent, annexed to a devise of realty, is perfectly good. It was unnecessary to decide the question as the ingenious six (who certainly deserved a better fate) were held to be out of Court on another point, but it is somewhat strange, at this time of day, to find six counsel capable of asserting, and an unusually able Judge capable of taking for granted, as he did in the most explicit and positive manner, the non-existence of what is, we venture to think, the most elementary and funda-

*As in the case of *Reynish* v. *Martin*, 3 Atk., 330, but see *Webb* v. *Grace*, 2 Ph., 701.

mental of all the propositions connected with the subject under discussion. Fortunately, we are relieved by a still more recent case before the Lords Justices (*Allen* v. *Jackson*, 1 Ch. D., 399), from the necessity of considering whether the dictum of the Master of the Rolls may not, after all be well founded. But while we agree that he was not justified in the truly startling conclusion he arrived at, the mere fact that so distinguished a Judge could be led into so grave and fundamental an error, sufficiently shows the unsatisfactory state of the authorities.

It will, we hope, be understood that in passing judgment on the inconsistent and unintelligible mass of authority which, at present, encumbers the question of the validity of conditions in restraint of marriage, we are far from ignoring the extreme difficulty of dealing satisfactorily with so delicate and complex a subject. While we believe that scarcely anything could be worse than the present state of the Law, we willingly admit that the Judges, in undertaking a crusade on behalf of matrimony, embarked upon an enterprise partaking of the nature of a forlorn hope. It is true that by multiplying distinction upon distinction they added obstacles of their own creation to those which were already sufficiently formidable; but we must not forget the serious character of the impediments which unavoidably obscured the prospect of success. We do not say that the Judges acted wrongly in endeavouring to protect the interests of matrimony against the machinations of crochety testators; we are by no means convinced that if, by the instrumentality of any moderately intelligible code, a testator could be deprived of the power of creating a forfeiture on the marriage, however eligible, of a legatee, such a consummation would not be desirable; nay, further, if the present Law, with all its defects and absurdities, were successful in securing the object it professes to have in view, if it did, in fact render it impossible or even difficult to frame a valid condition in general restraint of marriage, we allow there would be some tangible result to set in the balance against the profuse expenditure in litigation occasioned by contradictory decisions and the growth of unreal distinctions, a result that we conceive might be considered by some persons, other than lawyers, as worth, say, a small fraction of the amount netted in costs by the legal profession. But even this set off cannot be claimed. It is not impossible, it is not even difficult to frame a condition in general restraint of marriage, in such a way as to hold good against the whole Bench of Judges. On the contrary, it is well-known to every country solicitor that nothing is easier than to frame such a condition, and perhaps there is scarcely a country solicitor in good practice who has not framed many of them. The process is delightfully simple,—no elaborate fictions are required, no intricate formalities have to be complied with, such as used to be considered necessary, to throw a decent veil over the proceedings in fines and recoveries,—all that has to be done is, instead of declaring a forfeiture on marriage, to declare that the devisee or legatee shall only enjoy the testator's bounty *until marriage*, in other words, to turn what is technically known as a *condition*, into what is technically known as a *limitation*. It requires no argument to show that the distinction between a condition and a limitation is just as unreal, with reference to the question under discussion, as the distinction between conditions subsequent and precedent. Every condition of forfeiture necessarily implies a limitation until forfeiture, and it is obviously a mere chance whether a testator, without a lawyer at his elbow, expresses himself in the one form or the other; or as in the case of *Webb* v. *Grace*, 2 Ph. 701, in some intermediate form, of which the interpretation is as much a chance as was the original choice of words. The distinctions taken on this head are of course extremely fine. The tendency of the recent decisions has been in favour of construing everything as a limitation. Where, instead of an absolute forfeiture, there is an alternative bequest on marriage, it seems, notwithstanding a very explicit gift for life in the first instance, that effect will be given to the clause of partial forfeiture, by way of limitation.* Indeed, in the recent case of *Allen* v. *Jackson*, already referred to on another point, the Lords Justices express-

* But see contra *Bellairs* v. *Bellairs*, L.R. 18 Eq. 510 noticed above.

ed much doubt as to whether an express limitation during life was not, under the circumstances, cut down by a subsequent clause of *absolute* forfeiture on marriage, so as only to take effect as a limitation until marriage. If the doubt entertained by the Lords Justices be well founded, we submit that the law relating to conditions in restraint of marriage would die a natural death for want of a subject upon which to operate, for if the words in *Allen* v. *Jackson*, did not constitute a condition, it is difficult to see how there can be any such thing at all as a condition as distinguished from a limitation. The Lords Justices endeavoured to persuade themselves that the distinction between conditions and limitations was a distinction capable of being decided with reference to the intention of the testator. We would gladly think it were possible to accept this view. It is, however, clearly untenable, the distinction is and must always remain a mere question of phraseology.

(To be continued.)

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

SAMO v. GORE DISTRICT MUTUAL FIRE INSURANCE COMPANY.

From C. P.] [June 27.

Insurance—Misstatement as to title and incumbrances—Divisibility.

The plaintiff employed one R., an insurance broker, in no way connected with the defendants, to effect an insurance on their building and stock, informing him of there being incumbrances to a large amount on the building; and they signed a form of application in blank and handed it to R., who filled in the application, except as to incumbrances, which he left in blank. R. then applied to one, G., who also acted as a broker, and was in no way connected with the defendants; and G. submitted the application to defendant's local agent, who accepted the risk and received the premium. The agent then forwarded the application to the head office for approval, who returned it to him for information as to incumbrances. The agent then applied to G., who referred to R. R. having tried but failed to find the plaintiff stated to G. that there were none, and G. then tore up the application and filled in another one, stating that there were no incumbrances, and signed the plaintiffs' name to it; this he handed to the agent, and on it the policy issued. It was also proved that after the issuing of the policy, the plaintiffs effected a further incumbrance on the land, but did not notify the defendants. The plaintiffs having sued the defendants on the policy, which provided that if the assured was not the sole and unconditional owner of the property insured, and unless the true title was expressed therein, the policy should be void.

Held (Burton, Patterson and Moss, J. J. A.,) Harrison, C. J., dissenting, reversing the judgment of the Common Pleas, that the policy was divisible as to the real and personal property, and that the plaintiffs could recover on the latter, although the policy was void as to the former.

D. B. Read, Q. C., for the appellants.
Jas. Bethune, Q. C., for the respondents.

Appeal allowed.

McHARDY v. TOWNSHIP OF ELLICE & DOWNIE.

From Q. B.] [June 27.

Road between Townships—Bridge—Duty to repair—Municipal Act of 1873, Sections 410 and 416.

A stream called Black Creek, of from 30 to 40 feet in width, with clearly defined banks, crosses the roads running between the townships of Alice and Downie and is crossed by a bridge on that road. The plaintiff sued the two townships for injury sustained in consequence of this bridge being out of repair.

Sec. 413 of the Municipal Act enacts that it shall be the duty of county councils to maintain bridges over rivers forming or crossing boundary lines between two municipalities within the county; and sec. 416 provides that in case one road lies wholly or partly between adjoining townships, &c., the council of the municipalities between which it lies shall have joint jurisdiction over the same, and the said road shall include a bridge forming part of the road. The Court (Hagarty C. J. C. P., Burton, Patterson,

and Moss, J. J. A.), allowing the appeal held that the Black Creek was a river within the meaning of sec. 413, and therefore that the county council were liable.

R. Smith, for the appellants.

C. S. Jones, for the respondent.

Appeal allowed.

BALL v. PARKER.

From Q.B.] [June 27.

Stat. of Limitations—Payment.

The paintiff, an attorney, had an account for costs against defendant, a merchant, for services rendered before 1870, and which was therefore barred by statute. It appeared that in 1872 the plaintiff ordered goods of the defendant, without any agreement at the time as to how they were to be paid for, but after defendant had rendered his account for them the plaintiff told him or his clerk that he had credited it against his, the plaintiff's account, and no subsequent demand was made upon him for payment. In 1875 the plaintiff wrote the defendant sending his account and asking for payment, and stating that he had credited defendant's account rendered.

The defendant's clerk answered repudiating the claim, and added "Trusting you may be able to make your account out of the parties against whom you got judgment in the case as well as the advances made by me in cash and supplies charged to you since in my books," &c.

Held (Moss J. A., Galt J., and Proudfoot V. C., Burton J. A. dissenting), that there was no evidence of any payment on account to take the case out of the statute.

Jas. Bethune, Q.C., for appellant.

M. C. Cameron, Q.C., for respondent.

Appeal dismissed.

GRIEVE v. WOODRUFF.

From Chancery.] [June 27.

Dower—Costs.

The plaintiff filed a bill to establish her claim to dower. The defendant by his answer admitted the plaintiff was entitled to dower, but he submitted that her proper remedy was at Common Law, under the Dower Act of Ontario, and claimed the same benefit as if he had demurred.

Held, (Burton, Patterson, Moss J. J. A., and Proudfoot V. C.,) that the defendant must pay the plaintiff's costs.

W. Mulock, for the appellant.

Attorney-General and *J. S. Ewart*, for the respondent.

Appeal dismissed.

WALKER v. WALTON.

From Chancery.] [June 27.

Mechanics' Lien Act, 1874, sec. 14.

Held, (Burton, Patterson, and Moss J. J. A., Proudfoot V. C., dissenting) that sec. 14 of the "Mechanics' Lien Act, 1874," does not apply to claims existing or accruing under sec. 4 of the Mechanics' Lien Act, 1873."

H. McDonald, for the appellant.

A. F. Campbell, for the respondent.

Appeal allowed.

WRIGHT v. MORGAN.

From Chancery.] [June 27.

Mortgage- Stat. of Limitations—Disputing note.

Held, (Burton, Patterson, Moss J. J. A., and Blake V. C.), that it is unnecessary for a defendant to plead the Statute of Limitations in order to prevent the plaintiff from recovering interest for a longer period than six years; merely filing the usual disputing note is sufficient for the purpose.

H. J. Scott, for appellant.

W. Mulock, for respondent.

Appeal allowed.

ST. MICHAEL'S COLLEGE v. MERRICK.

From Chancery.] [June 27.

A. J. Act 1873, sec. 3.—Pleading equitable defence at law.—Equitable garnishment.

J. D. M. and A. M. were partners for the purpose of executing a contract. J. D. M. induced A. M. to admit S.M. his wife in his stead as a partner. A. M. then purchased J. D. M.'s interest and agreed to pay S. M. $10,000 therefor, which sum was not due at the time of the commencement of this suit. The plaintiff had obtained a verdict at law against J. D. M. and a rule was pending before the full court. The bill in this suit was filed on behalf of all the creditors of J. D. M. to impeach the arrangement whereby S.M. was substituted for J.D.M. It alleged that he was insolvent, and that it had been done for the purpose of defeating them in the recovery of their debt and prayed for an injunction to restrain A. M. from paying the $10,000 to either of the defendants, and further asked that the money might be applied to their debt.

Held, (Hagarty C. J. C. P., Burton, Patterson & Moss, J. J. A.) that the interest in the contract was not such an interest as could be attached by creditors.

Held, also, that the A. J. Act 1873, sec. 3, is permissive, and that a defendant may plead his equitable defence at law, or take proceedings in equity, but the equitable defence must be before judgment, as a judgment cannot be impeached in equity on equitable grounds if a defendant does not choose to raise his equitable defence in time.

Held, also, that after judgment at law, a plaintiff may proceed for the realization of it, either at law, or in equity, as the subject of a bill filed for that purpose would not be the same subject matter as that of the action at law establishing the right.

Fitzgerald, Q.C., and *Donovan*, for the appellants.

Attorney-General, and *Meek* for the respondents.

Appeal dismissed.

CHANCERY.

WYOMING V. BELL.

V. C. P.] [June 27.

Dedication—36 Vict. cap. 22. (O.)—Improvements.

A reservation for school purposes is of such a character as to be the subject of dedication.

The owners of land in 1856 caused the same to be surveyed and laid off into Village lots, and on the plan thereof, which was duly registered, marked a portion as "Reserve for School Ground." An auction sale of lots took place during the same month with reference to the lots not fronting on the reserve, when lots to the value of $20,000 were sold, and after the auction, lots were sold privately according to the plan. The school trustees did not take possession of the School reserve. Subsequently, conveyances were executed to S. of all the unsold portions of the town as surveyed. S. in January 1863 caused a new plan to be prepared and registered in which the School reserve was laid out into Village lots, some of which had meanwhile been bought by the defendant from an intermediate owner with notice of the original plan and the reservation for school purposes:

Held, on a bill filed in 1876, that the original plan was binding; that the conveyance to S. did not give him the ownership of the soil of the streets or reserves for public purposes, and that the defendant was not entitled under the statute, 36 Vict. cap. 22 (O.) to be paid for any improvements he had made upon the lots forming part of the school reserve.

CRAIG V. CRAIG.

V. C. P.] [June 27

Easement—Injunction—Private way.

An agreement for an easement is presumed *prima facie* to be for an easement in perpetuity.

A legal title to a private right of way, can be obtained only by prescription, or by user for the time required by statute to give a title to easement, or by grant; but equity entertains jurisdiction to enforce agreements for easements as it would for the purchase of the fee.

The owners of two adjoining half lots entered into a general agreement, not limited in terms, for the construction of a lane between their respective properties and each gave about a rod for the formation thereof. The respective proprietors occupied the lands, using the lane in common for about 15 years, and until after the death of one of the original owners who had cultivated his farm and planted an orchard with reference to the lane.

Held, that the agreement must be presumed to have been for a lane in perpetuity, and was to be enforced accordingly.

ROE V. BRADEN.

CHANCELLOR.] [June 27.

Registered Title.—Notice.—Possession.

In the case of a registered title, actual notice of the title of an adverse claimant is required to affect the grantee holding under a registered instrument. The mere fact that such adverse claimant is in actual possession of the land is not sufficient notice; nor will it be actual notice if the grantee is aware of the fact that a person other than his grantor is in possession.

COLONIAL TRUST CO. V. CAMERON.

V. C. P.] [June 27.

Trustee—Solicitor.—Costs.

The rule that a trustee, acting as a solicitor of the trust, is entitled to costs out of pocket merely, applies only when the costs are payable out of the trust funds, not when payable by an adverse party. *Meighen* v. *Buell*, 24 Gr. referred to and distinguished.

RE ROBERTSON.

V. C. P.] [June 27.

Practice—Costs—Experts.

The general orders 240, 482 and 541 do not authorize the Master in proceedings before him to employ the services of experts; but where in an administration suit, instituted by the infant children of the deceased, whose estate, as appeared at an early stage of the proceedings, was insufficient to pay the creditors, the Master had, at the instance of the plaintiffs and with the consent of the creditors, employed an expert whose services had been of benefit to the estate, by having a large claim against it disallowed. The Court *held*, on appeal, that the creditors could not afterwards on the taxation of costs object to the allowance of the sums paid to such experts.

When in such a suit the plaintiffs had incurred the expense of several journeys to examine the books of the estate, *held*, that as these journeys had been made and the expense incurred without the consent of the creditors—the only persons really interested in realizing the estate—the charge could not be allowed to the plaintiffs on taxation.

Although by the tariff of costs the attendance before the Master may be increased to $2 an hour by the local Masters on taxations, still order 312, giving the taxing officer at Toronto power to revise the taxation, empowers him to reduce such allowance.

The Master disallowed the whole of the charges for the service of warrants on creditors, and, as the proceedings had not been sanctioned by the creditors, the Court, on appeal, sustained this ruling. Although had the proceedings been approved of by the creditors, it would have been reasonable to have allowed so much of the charge as would have been incurred in serving the creditors with notice of the proceedings, notice being all that is required to be served on creditors whose claims are disputed.

The same rule was adopted in respect of a fee paid to a counsel in the United States, notwithstanding that his services had been beneficial to the estate.

The Master had disallowed the solicitor of the plaintiff's charge for comparing the deeds of property sold to purchasers under the decree. On appeal the Court over-ruled the Master's finding, it being the duty of the vendor's solicitor to see that the engrossed deed agrees with the draft.

Where the Master had exercised his discretion in making an allowance to a solicitor for his services in respect of encumbrances, the Court refused to disturb his ruling. Instalments of purchase (not deposits on sale) were paid by the purchasers to the solicitor of the plaintiffs, and by him paid into Court. *Held*, that he was not entitled to any remuneration from the estate for such service, it being the duty of the purchasers to pay these moneys into Court.

A sum of money paid to the local Master for going out of the Province to take evidence was disallowed, as it was not shown that the creditors had desired or consented to the proceeding.

Certain disbursements, for the proving of which an affidavit had been made, were disallowed on taxation: *held*, that the charge for preparing the affidavit was also properly disallowed.

Armstrong v. Gage.

V. C. P.] [Sept. 5.

Duress—Execution of Mortgage to avoid arrest.

The plaintiff, a farmer of about 60 years of age, who was in the habit of selling wheat and other grain to the defendant Bierly, filed a bill to set aside a mortgage executed by the plaintiff in favour of the defendant Gage for $600 under the following circumstances: The plaintiff having brought a load of wheat to Hamilton, to sell, and having procured a ticket in the usual manner, evidencing its weight, sold it to Bierly, in whose integrity plaintiff stated he had the fullest confidence, and left the ticket with his clerk, who afterwards objected that the amount of wheat mentioned in the ticket was much larger than that actually delivered by plaintiff, and who, it was alleged, had changed the figures "12.40," into "42.40," thus evidencing forty-two bushels and forty pounds, instead of twelve bushels and forty pounds; that Bierly had plaintiff taken to the office of Waddell, a solicitor in Hamilton, and there, while a detective was stated to be and was in fact in an adjoining room, a computation was professed to have been made of several other quantities of wheat which it was asserted the plaintiff had cheated Bierly out of by altering other tickets, making up in all a sum of $504.37, which it was stated plaintiff had thus obtained from Bierly by forgery; and plaintiff was then told that unless he executed a mortgage on his farm for $600, he would forthwith be arrested and committed to gaol; that plaintiff had requested permission to communicate with some solicitor, but defendants refused to permit him to do so, and threatened that if he left the office he would be arrested immediately. That the plaintiff, being utterly prostrated by these charges and being ignorant what legal responsibility he might inadvertently have incurred and dreading the consequences of such a charge, though unfounded, being made against him, he was in such a state of mind as to be wholly unable to judge clearly or deliberately of his position, and at length, after being kept in Waddell's office for at least four hours—although he was, meanwhile, offered permission to go and see a solicitor by Waddell, who refused, however, to insure him from arrest—the plaintiff was induced to execute the mortgage as he alleged by coercion and duress, for $600, although plaintiff alleged that the whole amount of grain ever sold by him to Bierly would not exceed $250.

The defendants denied the charges of fraud, conspiracy, duress and coercion made against them, and at the hearing of the case in June, 1874, a decree was made by consent, referring

it to the Master at St. Catharines to "inquire and state what, if anything, was due to Bierly in respect of the grain transactions in the pleadings mentioned on the 15th November, 1873," reserving further directions. The reference was afterwards changed to the Master at Hamilton, who on 8th of July, 1876, made his report, whereby he found that there was due to Bierly in respect to the said transactions—exclusive of the twelve bushels and forty pounds of wheat—the sum of $450.15 principal and $3.16 interest. From this report the plaintiff appealed on the ground that the Master should not have found anything due to Bierly on the wheat transactions, and the appeal came on to be argued before

Proudfoot, V.C., who held, that the plaintiff was not under the circumstances precluded from disputing, notwithstanding the consent decree that had been made, the validity of the mortgage, and that the evidence sufficiently shewed that the mortgage had been executed by the plaintiff under duress and coercion; and that the evidence when properly weighed, negatived the claim of Bierly. He allowed the appeal with costs.

Buchanan v. Brooke.

V. C. P.] [Sept. 5.

Equitable execution.

This was a suit for equitable execution. It appeared that the defendant being liable to the plaintiff, as endorser, his father had devised the income of his estate to the defendant and his wife, for the support of themselves and family, and after their decease the corpus was to be divided among their children. There was no devise over of the estate in case of process issuing at the instance of his creditors. Under these circumstances, the Court directed a reference to the Master to inquire what would be a sufficient sum for the proper support of the defendant and his family: the excess over and above that amount to be applicable to the payment of the plaintiff's claim.

The Grand Junction Railway v. The Corporation of Hastings.

V. C. P.] [Sept. 5.

Invalid assignment of Corporation assets.

This suit was instituted to set aside a transfer of $50,000 of stock, held by the defendants, the County, in the company of the plaintiffs, to the defendant McIntosh, alleged by the plaintiffs to have been so made to him fraudulently on the 2nd October, 1873, in order to avoid payment of future calls; and charging that McIntosh was a person of no means, and unable to pay calls. The cause came to be heard before Vice Chancellor Proudfoot at the last Spring sittings at Belleville, when the learned Judge determined that if the transfer were real it would not be void, even though the object of such transfer were to get rid of the liability to pay calls; that the result of the evidence was to establish that it was intended to be an absolute transfer, unfettered with anything in favor or for the benefit of the County—reserving simply the question whether or not the transfer had been effectually made.

It appeared that no question had ever been raised as to the *bona fides* of the original subscription, and that the County acted on it for several years, and paid calls to the extent of $15,000; that on the 1st October, 1873, while the stock stood in the name of the County, the Council, being then in session, authorized the Warden to appoint a committee of six to act with him in the Grand Junction Road matter; that the Warden accordingly appointed the committee, which reported next day, recommending that the Warden should be instructed to pay the then present call on the said stock; and that he should be authorized at any time thereafter, without calling the Council together, to manage the stock as he thought best in the interests of the Council, with full power to sell or otherwise dispose of the same as he should think fit. This report was adopted by the Council, and on the same day the Warden sold the stock to defendant McIntosh for $1.00, and duly executed a transfer thereof to him under the seal of the County.

Under these circumstances, the Vice Chancellor held the transfer invalid, as not having been duly authorized, and ordered the defendants to pay subsequent calls and the costs of suit; the Vice Chancellor observing that "to give legal authority for the alienation of the property of a municipal council, I apprehend a by-law under the seal of the corporation is necessary. The Municipal Act passed in March, 1873—36 Vict. ch. 48 (O.)—and which in this respect but repeats previous enactments, enacts (S. 372) that the council of every county may pass by-laws for obtaining such real and personal property as may be necessary for the use of the corporation, and for disposing of such property when no longer required. . . . A resolution seems in some cases to have amounted to an agreement which equity would enforce, but that was where money had been expended on the faith of it: Grant on Corp. 57. But the general rule, I conceive, is to be found in the statute which treats a by-law as necessary."

UNITED STATES REPORTS.

SUPREME COURT OF THE UNITED STATES.

SOUTHERN EXPRESS COMPANY v. DIXON.

Delivery to consignee of goods at place other than destination.

T., one of the firm of T. & R., delivered to an express company at Greensboro, N. C., goods consigned to the firm of T. & R. at Columbia, S. C., at the time informing the company that the goods were the property of D. Subsequently, without the consent of D., the express company delivered the goods at Greensboro upon the order of T. *Held*, that the company were liable to D. for the value of the goods.

[15 Albany L. J. 491.

In error to the Circuit Court of the United States for the Southern District of Alabama. The facts appear in the opinion.

Mr. Justice HUNT delivered the opinion of the court.

The case in brief is this: The agent of the plaintiff Dickson, delivered to the express company at Greensboro, North Carolina, fifty-two boxes of tobacco to be shipped to Columbia, South Carolina. The boxes were consigned to Trent & Rea at that place, and the delivery to the company for shipment was made by Trent, one of the said firm, who at the time informed the company that the tobacco was the property of the plaintiff. A written receipt was given by the company in the usual form. The boxes never left Greensboro, but were sold by Trent to one Mendenhall, without authority of the owner, and by the order of Trent were delivered to him by the company at Greensboro.

The court charged the jury that, if they believed from the evidence that the tobacco was, at the time of its delivery to the defendant, the property of the plaintiff, and that was known to the defendant or its agent, though by the receipt given for it Trent & Rea were the consignees thereof, and the defendant might lawfully deliver the said tobacco to the consignees at Columbia, South Carolina, the defendant was not authorized to deliver the same to the consignees, or either of them, or to any other person by the order of either of them, at Greensboro, North Carolina, the place of shipment, and such delivery at Greensboro, North Carolina, without the knowledge or consent of the plaintiff, would not discharge the defendant from liability therefor to the plaintiff. To which charge of the court the defendant then and there excepted.

By various requests to charge the defendant presented the point in different forms, but the question of law is clearly indicated by the charge given and the exception thereto. If the express company was justified in delivering the property at the place of its intended shipment upon the order of Trent, it is not liable in this action. If not so justified, but if it was bound to transport and deliver as agreed in its receipt, or to deliver it to the owner, then it is liable, and the judgment should be affirmed.

We are not called upon to question the proposition that a consignee of goods is for many purposes deemed to be the owner of them, and may maintain an action for their non-delivery. 1 Par. Ship. 269. In the case before us the proof was given, and the jury found that the goods did not belong to the consignees, but were the property of the shipper, and that this was known to the carrier. The question is, rather, where it is known that the goods are the property of the shipper, and have been shipped by him for delivery to the consignees as his agents at a distant place, can the carrier deliver the goods to such consignees or to their order at another place, or without starting them on their journey? We think the rule is that where the consignor is known to the carrier to be the owner, the carrier must be understood to contract with him only, for his interest, upon such terms as he dictates in regard to the delivery, and that the consignees are to be regarded simply as agents selected by him to receive the goods at a place indicated. Where he is an agent merely, the rule is different. This is illustrated by the case of *Thompson* v. *Fargo*, 49 N. Y. 185. Thompson had, as the agent of White, collected certain moneys belonging to White, and inclosing them in a package directed to White at Terre Haute, Indiana, sent the package from Decatur, in the same State, by the express company. Various attempts were made to deliver the package to White, but he could not be found, and Thompson, the shipper, at length demanded the return to him of the package, and on refusal brought an action to recover its value. The Court of Appeals of New York held that the action could not be maintained, saying that if the case had been one of a sale by the consignor with no directions from the consignee how to ship the goods, an action might have been sustained by him, as the title would remain in him, but when the consignor was the mere agent, having no interest in the property, but acting in pursuance of the orders of the owner, in shipping the property, he could not maintain an action; that a delivery to him would be no defense to an action by the owner. The case of *Duff* v. *Budd*, 3 Brod. & B. 177, holds the same rule.

The numerous cases cited by the plaintiff in error, to the effect that any delivery to the consignee, which is good as between him and the carrier, is good against the consignor, are cases

where the carrier has no notice of the ownership of the property other than that implied from the relation of the parties to each other as consignor and consignee. This gives to the consignee the implied ownership of the property, and hence justifies the carrier in taking his direction as to the manner of delivery. In addition to those authorities, reference may be had to *Sweet* v. *Barney*, 23 N. Y., 325, where a bank in the interior of New York sent by express a package of money directed to "The People's Bank, 173 Canal street, New York." The package was delivered to an agent of the People's Bank at the office of the express company, and was stolen from such agent. The bank in the interior brought its action against the express company, and the question was whether the express company was authorized to deliver the package at any other place than 173 Canal street. The court held that as there was no notice to the express company that the money was not the property of the People's Bank, in the city of New York, nor any circumstances to weaken the presumption that the money belonged to that bank, any delivery that was good as to that bank discharged the carrier.

Of the character mentioned is the case of *L. & N. W. R. W. Co.* v. *Bartlett*, 7 H. & N. 400, which is much relied on by the plaintiff in error. The consignee in that case was the purchaser of the wheat in question, and consequently any delivery to him, or his order, wherever it might be, would be a discharge to the carrier.

The same fact existed in *Mitchell* v. *Ede* and *others*, 11 Ad. & Ellis, 888. The plaintiff recovered the value of the sugars shipped from Jamaica, for the reason that under the circumstances stated he was held to be the owner of them. Upon the same principle is *Foster* v. *Frampton*, 6 B. & Cr. 107, where the goods were received from the carrier by the actual vendee, and it was held that the *transitus* was at an end.

We do not perceive any thing adverse to the principles we have stated in the learned opinion delivered by Ch. J. Shaw in *Blanchard* v. *Paige*, 8 Gray, 285, nor in *Lee* v. *Kimball*, 45 Me. 172, which holds that where a vendee of goods sells the same before reaching their destination, the right of stoppage *in transitu* is ended.

We base our judgment upon the bill of lading and its legal results, adopting the fifth point of the plaintiff in error, that any antecedent agreement or understanding was merged therein and extinguished thereby. The circumstances of the shipment, how and by whom made, and the knowledge of the ownership, were proved without objection. These circumstances, and the bill of lading adopted and claimed by the plaintiff, and the point raised by the exception to the charge of the judge, present the question we have discussed and no other.

The plaintiff in error now contends in his eleventh point that Dickson was not the owner of the tobacco. This point cannot be raised here. No request or exception was made which involves the question. The ownership was assumed throughout the trial, in the charge of the judge, not disputed in the requests to charge, and if a subject of doubt in any form, must be considered as settled by the verdict. The only suggestion of a denial of ownership is in the request to charge that if the tobacco was in the possession of Trent, as agent of Dickson, or otherwise, then the delivery to him or his order was lawful. To hold this to be a denial of the ownership of Dickson, or a claim of ownership by Trent, would go far beyond any reasonable construction. We see no error in the rulings at the trial, and are of the opinion that the judgment should be affirmed.

SUPREME COURT OF RHODE ISLAND.

Heeney v. Sprague.

When injuries resulting from violation of municipa ordinance do not give right of action.

The violation of a duty imposed by a municipal ordinance, and sanctioned by a fine, will not support an action on the case for special damages in favor of one injured by the violation and against the violator.

[15 Albany L. J. 512.

Motion in arrest of judgment. The action was brought by William Heeney and wife against Mary Sprague for injuries received by Mrs. Heeney in falling upon a slippery sidewalk in front of defendant's premises. The sidewalk had become slippery from a neglect on the part of defendant to remove the snow therefrom. A city ordinance of the city of Providence in which such premises were situated, required the removal of snow from the sidewalk in front of any premises in the city and prescribed a penalty for a failure to comply with the ordinance. The jury at the trial rendered a verdict in favor of plaintiff for $2,750.

Durfee, C. J. The plaintiffs base their right to maintain this action on the authority of cases which, they claim, hold that where a person is required by statute to do an act and neglects to do it, any person specially injured by the neglect is entitled to recover his damages in an action on the case, if no other remedy is given, and that, too, even when the statute imposes a penalty for its violation: *Couch* v. *Steel*, 3 El. &

B. 402, 411; *General Steam Navigation Co.* v. *Morrison*, 13 C. B. (N. S.) 581, 594; *Caswell* v. *Worth*, 5 El. & B. 849; *Atkinson* v. *New Castle & Gateshead Water Works Co.*, L. R., 6 Exch. 404; *Aldrich* v. *Howard*, 7 R. I. 199. It has been doubted, however, whether the cases go so far as is claimed. This doubt is expressed in *Flynn* v. *Canton Co. of Baltimore*, 40 Md. 312, and in that case the attempt is made to confine the liability to cases in which the neglected duty is prescribed for the benefit of particular persons, or of a particular class of persons, or in consideration of some emolument or privilege conferred, or provision made for its performance, and to show that it does not extend to a duty imposed without consideration and for the benefit of the public at large, the only liability for the neglect of such a duty being the penalty prescribed. And this view is supported by strong, if not irrefragable authority: *Hickock* v. *Trustees of Plattsburg*, 16 N. Y., note on p. 161; *Eastman* v. *Meredith*, 36 N. H. 284; *Bigelow* v. *Inhabitants of Randolph*, 14 Gray, 541; *Aldrich* v. *Tripp*, Index C, 14. But even supposing the liability is not subject to any such qualification, then, inasmuch as the neglected duty was not enjoined by statute but by a municipal ordinance, the question arises whether in this respect an ordinance is as effectual as a statute. There are many things forbidden by ordinance which are nuisances or torts, and actionable as such at common law. The question does not relate to them. The defendant has not done anything injurious to others which she was forbidden to do; she has simply left undone something beneficial to others which she was required to do under a penalty in case of default. The thing required was not obligatory upon her at common law. It was a duty newly created by ordinance, which, but for the ordinance, she might have omitted with entire impunity. The question is, whether a person neglecting such a duty is subject not only to the penalty prescribed, but also to a civil action in favor of any person specially injured by the neglect. If the liability exists, it is quite a formidable one. A fall on the ice is often serious in its consequences. The damages resulting from it may amount to thousands of dollars. And under the ordinance, the liability, if it exists, may be visited upon either the owner or the occupant of the abutting premises, or upon any person having the care of them. And further, if the liability exists under the ordinance in question, it exists *pari ratione*, under every ordinance prescribing a similar duty. To hold that it exists is therefore to recognize, outside the legislature, a legislative power as between individuals which, though indirectly exercised, is nevertheless in a high degree delicate and important. This we ought not to do, unless upon principle or precedent our duty to do it is clear; for we do not suppose that the creation of new civil liabilities between individuals was any part of the object for which the power to enact ordinances was granted.

In some of the cases the origin of the liability upon a statutory duty is ascribed to the statute of Westminster 2, cap. 50; 2 Inst. 485–6. See *Couch* v. *Steel*, 3 El. & B. 402, 411; *Aldrich* v. *Howard*, 7 R. I. 199, 214. That chapter, however, relates only to statutes; it does not extend to municipal ordinances. But even if the liability has its origin in the common law, we do not find that it has ever been held to extend to a neglect of duty enjoined simply by a municipal ordinance, and we think there are reasons, apparent from what we have already said, why it should not extend to it. The power to enact ordinances is granted for particular local purposes. It includes or is coupled with a power to prescribe limited punishments by fine, penalty, or imprisonment for disobedience. No power is given to annex any civil liability. The power, being delegated, should be strictly construed. It would seem, therefore, that the mere neglect of a duty prescribed in the exercise of such a power should not be held to create, as a legal consequence, a liability which, within the power, could not be directly imposed.

The plaintiffs, in support of the action, refer to *Jones* v. *Firemen's Fund Insurance Co.*, 2 Daly, 307, and *Bell* v. *Quinn*, 2 Sandf. 146. Neither of these cases is like the case at bar. The first was an action upon a policy of insurance containing a provision that the policy should be void whenever any article should be kept in greater quantities than the law allowed, or in a manner different from that prescribed by law, unless provided for in the policy. The plaintiff, who was insured, kept a kind of fireworks, called "colored lights," contrary to a city ordinance. The court decided that city ordinances within the city limits have all the force and effect of law, and that the plaintiff, therefore, could not recover. Here the only question was whether a city ordinance was a law in the sense in which the word was used in the policy. The court, in deciding that it was, expressed itself broadly; but its language, in so far as it covered more than the point decided, was *obiter dictum*. The case of *Bell* v. *Quinn*, 2 Sandf. 146, involved the effect not of a city ordinance but of a city charter. The action was upon a contract entered into in violation of the

charter, not for damages resulting from its non-observance. The court said: "We will not say what the consequence would be if the prohibition were found in an ordinance of the corporation instead of the statute law. 2 Sandf. 151." And see *Ex parte Dyster in the matter of Moline*, 1 Meriv. 155; also in 2 Rose, 349; *Kemble et al*, v. *Atkins et als.*, 1 Holt's N. P. 427 and note; 7 Taunt. 260. The defendant, on the other hand, has referred us to three cases: *Vandyke* v. *City of Cincinnati et al.*, 1 Disney, 532; *Kirby* v. *Boylston Market Asso.*, 14 Gray, 249; *Flynn* v. *Canton Co. of Baltimore*, 40 Md., 312. These cases are all in point, for they are exactly like the case at bar It was held in each of them that the only liability of the delinquent, under the ordinance, was to pay the penalty prescribed by it, and that the action could not be maintained. These decisions, in the absence of any case to the contrary, are entitled to our respect as authority, and for the reasons above indicated we agree with them. See *Brown, adm'r.* v. *Buffalo & State Line R. R. Co.*, 22 N. Y. 191; *Administrator of Chambers* v. *Ohio Life & Trust Co.*, 1 Disney, 327, 336.

The defendant's motion in arrest of judgment is sustained. *Judgment arrested.*

CORRESPONDENCE.

WHETHER DOWER ASSIGNABLE —WHETHER AVAILABLE TO CREDITORS.

To the Editor of the Law Journal:

I purpose now to examine the question whether the right to Dower is assignable; and how far it is available, if at all, for the benefit of creditors. And this part of the subject may be conveniently divided into a consideration of the properties and incidents of the right; 1st, when inchoate; and 2nd, when consummated by the death of the husband. The wife's interest is one, the consequences of the possession of which are rather incongruous. The complete enjoyment of the right depends not only upon her surviving her husband, but upon her avoidance of certain acts, the commission of which would bar or extinguish her right; such as adultery and elopement, or detinue of charters. Her interest can therefore hardly be said to be the subject of absolute property; since such, or the like, acts will not work a forfeiture of other interests in land. Depending, as it does, upon all these conditions, we can hardly expect to find traces of dealings with it as a distinct species of property; though our inability to discover them, even on account of their non-existence, will not alone justify the inference that it might not of itself have been the subject of bargain and property, had creditors or purchasers chosen to traffic for such a precarious right. But we find it made the subject of barter for a provision by jointure. This might have been done either before marriage or during the coverture; and in the latter case, though she was put to her election on the husband's death, still this arose from her disability to consent to the contract during coverture, and was not on account of the want of negotiability in the interest. This, as between husband and wife. Otherwise, it was usually regarded as a species of incumbrance upon, or an incident to, an estate, desirable to be got rid of and usually negotiated for upon a sale of the interest of the husband in the land. If her interest, being the possibility of succeeding to a portion of the estate, depending upon the chance of surviving her husband, be regarded as a mere possibility (though I shall endeavor to show hereafter that it has qualities which a mere possibility does not possess) it may be brought within the rules in Equity governing the assignment of possibilities. It would, on this assumption, appear to be analogous to the several species of property which form the subject of the class of cases represented by the following:—In *Warmsley* v. *Tanfield*, 1 Ch. Rep. 29, it was decided that a grant of a future possibility was not good in law, yet a possibility of a trust *in equity* might be assigned. And in *Hobson* v. *Trevor*, 2 P. Wms. 191, an agreement in marriage articles made in the lifetime of T., the grandfather of the wife, by her father, to con-

vey to the husband the one third part of what should come to the father of the wife on the death of T., his father, was decreed to be performed *in specie* after the death of T. intestate. In other words, the possibility of the heir's succeeding to his ancestor's estate was held to be the subject of assignment in the ancestor's life-time. See also *Wright* v *Wright*, 1 Ves. Sr. 411. In that case there was a devise of land to Robert or his heirs, to take effect on the happening of a contingent event. Robert, before the contingency happened, conveyed all his interest to his youngest son and his heirs, and then died. The contingency happening, it was held, that Robert's heir could not claim this against his father's deed. In other words, this possible interest, depending on the happening of an event, was held to be the subject of conveyance before the contingency happened. See also the cases cited in *Wright* v. *Wright*. In Story's Eq. Jur., 12th Edn. by Perry, 1040, it is laid down that "To make an assignment valid *at law* the thing which is the subject of it must have actual or potential existence, at the time of the grant or assignment. But Courts of *Equity* will support assignments * * of things which have no present actual or potential existence, but rest in mere possibility; not, indeed, as a present possible transfer operative *in præsenti*; for that can only be of a thing *in esse*; but as a present contract, to take effect and attach, as soon as the thing comes *in esse*." If the above analogy be well drawn, it would seem that the inchoate right might always have been assigned for value in Equity; though not at law until after the passage of the Acts hereafter referred to; yet, from its precarious nature, seldom if ever made the subject of barter. We find the view that it was a distinct species of property confirmed by the wording of the 37 Geo. III. cap. 17, (C. S. U. C., cap. 84, s. 5) which empowered any person without her husband's being party thereto, to bar her Dower by Deed containing a release thereof, executed as directed by the Statute; and shewing her untrammelled consent to the conveyance by a certificate in due form as thereby required; and such a conveyance was to have the same effect as a fine levied; which was the mode of barring her Dower previous to the Act. In other words, instead of resorting to the tedious process by fine she could now by an instrument executed as directed make a complete conveyance of her interest. "For, the expression that a woman may *bar her dower* in any lands, means no more than that she may convey, release, or part with, or do some act, which avoids her dower, or right to dower," per Wilson, J., in *Miller* v. *Wiley*, 16 C. P. 537. And the otherwise possible inference, from the use of the word "release" in the Act that there must be already an estate in the land in the releasee, upon which the release of dower might operate, is rebutted by the declaration in the Act that such a conveyance shall have the same effect as a fine would have had. See also 32 Vict. cap. 32, s. 31, O., where this right is also regarded as a distinct species of property. It would, therefore, seem that it was regarded by the Legislature as, or to use the words of Lord Chancellor Talbot (3 P. Wms. 234) "that here was the opinion of the whole parliament in the point" that it was a distinct species of property; a new method of dealing with which was supplied by this and the following Acts. The 50 Geo. III., cap. 10 (C. S. U. C., cap. 84, s. 6) extended the power of examination and granting certificates to other officials than those named in the former act. And the 3 Wm. IV. cap. 10, (C. S. U. C., cap. 84, s. 6) related to the form of certificate when the husband was parting with his interest and the wife joined to bar her Dower as incident thereto. The 2 Vict. cap. 6 was then passed, which by Secs. 3 and 4 enacted, that where a wife joined

with her husband in a conveyance containing a release of Dower, it should be a valid release without any examination or certificate. Though we find it said in *Miller* v. *Wiley*, 16 C. P., p. 542, "If she disposed of her right to Dower in the lifetime of her husband through whom she claimed it, she could only do so by a deed to be executed by her jointly with her husband," still we find the same learned judge who used these words, when speaking of the same question in *Miller* v. *Wiley*, 17 C. P. 372, (after referring at the beginning of his judgment expressly to the case in 16 C. P.) saying "We express no positive opinion" on the question. The 37 Geo. III., cap. 7, manifestly gives her power to part with her interest without the joining of her husband, and that act was not repealed, but forms part of cap. 84, of C. S. U. C. Whatever argument in support of the view expressed in *Miller* v. *Wiley* might be founded upon the wording of the 2 Vict., cap. 6, is well answered by Robinson, C. J., in *Howard* v. *Wilson*, 9 U. C. R. 450: "I see nothing," says the learned Judge, "in any of the Acts, which makes a married woman less capable now of releasing her Dower by deed executed by herself alone, than she was by 37 Geo. III., cap. 10, which enables her to release her Dower by deed executed by herself, and makes her conveyance as effectual as if a fine had been levied." And, referring particularly to 2 Vict. cap. 6, the learned Chief Justice remarks that it was not restrictive, but enabling, in its provisions. "If before this Statute she could by a deed, executed by herself only, have released her Dower, provided an examination took place and a certificate were given in regard to her free consent, I cannot see that this clause would have disabled her from afterwards releasing in the same manner." And, indeed, its effect seems to be merely this, that where the husband joined, the examination and certificate were dispensed with. See also *Hill* v. *Greenwood*, 23 U. C. R. 404, where it was held that the 2 Vict. cap. 6, sec. 3, was not confined to deeds by which the husband conveys his interest in the lands; and *Bogart* v. *Patterson*, 14 Gr. 624. And in such a case also there must have been express words in the deed conveying or releasing the right. It would not pass as incident to the husband's estate merely from the wife's joining, though where the deed failed to take effect, by reason of the husband's having no interest to convey, or was void by reason of fraud, the dower would not pass even when express words were used in the deed. This arose from a want of intention to assign the interest as a distinct species of property or otherwise than as incident to the husbands estate. See *Miller* v. *Wiley*, 17 C. P. 308, where it was so held. But in this case, which was an action of dower, the tenants claimed adversely to the deed by which they contended that the demandant had parted with her right; and therefore they were precluded from saying that she was estopped by it. And the judgment expressly avoids the question now under examination; see also *Bank of U. C.* v. *Thomas*, 2 E. & A. 502. Still Mr. Justice Wilson's *dictum* only relates to the mode of conveyance. It does not disprove the proposition that the right is a distinct species of property and a negotiable one.

We now come to the consideration of C. S. U. C. cap. 90, by which (sec. 5) "a contingent, an executory and a future interest, and a possibility coupled with an interest in land" were made assignable. If this interest can be brought within the wording of this Act, no doubt can exist as to its being subject to execution. Some writers have thought that where the object of a contingent interest was not ascertained, the interest was a mere possibility; but became coupled with an interest when the *person* became fixed.

The wife's interest comes within the latter part of this description; since she is the ascertained object of a contingent interest. And taking this view of it, the interest would be within this Act. For though the event of the husband's death cannot be said to be a contingent one, yet the contingency lies in the uncertainty of its happening in the life-time of the wife. And it is said by Mr. Leith (R. P. Stat. p. 67) that the statute relates not to interests which are vested as regards estate and merely executory as regards enjoyment, but rather to those which are future and executory as regards not only their enjoyment but also their vesting; and further, are defined to be "interests at the same time executory future and contingent."

It may be argued that her interest is of a like nature with that of one of two persons, in favour of the survivor of whom a gift is to take effect, which is said to be a mere possibility. But her interest is swallowed up or merged in the estate of the husband upon her death; he does not take the same interest which would have vested in her, had she survived him; so that this analogy is not perfect.

Let us glance at several instances of naked possibilities, and see if the wife's interest comes within a description which would include them. The heir has a possibility of succeeding to his ancestor's estate. A devisee, named in the will of a person living, has a possibility of receiving the benefit of the devise. But has either of them more? It cannot be said that either one has any *interest*, in addition to the possibility; for, though we have an instance above of a purchaser bargaining with the heir for his chances, still the ancestor may disinherit the heir without his consent, by making a will, and the purchaser takes nothing; and the devisee again may be deprived of all possibility of taking under the will by its cancellation, or the making of a new one; and this, even in opposition to his dearest wishes. In what position does the wife stand when compared with these? She is the certain object of the interest termed "right of dower," as the heir apparent is the ascertained person to succeed to the estate of the ancestor; or the devisee, the person fixed to take under the will in which he is named. In what, then, does her position differ from that of either of these? In this, that she has an interest which, without her consent, *cannot be diverted* from the course in which it will gravitate in case she survives her husband. While the heir and devisee may each be deprived, without their consent, of their present rights, the widow has such an interest coupled with the possibility of surviving her husband as she cannot be divested of, except by her own consent; and for which, upon parting with it, even to the person owning the estate out of which it is to be enjoyed, she is at liberty to ask a *quid pro quo*. Since she has something which she may demand a consideration for, upon parting with it, it can hardly be denied that this something which may one day become an actual vested estate in lands, may be called an *interest*. It must be admitted that it is, at least, a contingent one. That it is a future one, or one to be enjoyed, if at all, in the future, will not be disputed. That it is a possibility, is obvious. And that the possibility is coupled with an *interest*, depends not solely upon the value of the above arguments, but has the sanction of the opinion of an eminent conveyancer. (Leith, R. P. Stat., p. 69.) It may therefore be said to be described by some one of the above terms. Assuming this to be so, it falls within the purview of C. S. U. C., cap. 90, sec. 5; and, while the interest had already become assignable at law by the statutes above referred to, of which it is the special object; under this

Act, being included in Sec. 5, by its broad language, it becomes subject to its other provisions which affect contingent interests and possibilities. And, upon the same assumption, whatever doubt may have existed, either at Law or in Equity, with regard to the liability of this interest to seizure under execution, would seem to have been removed by section 11, which enacts that any interest which by sec. 5 "may be assigned or conveyed by any party, shall be bound by the judgment of any Court of Record, and shall be liable to seizure and sale under execution against such party, &c." If this assumption be well founded, a married woman, being possessed of such an interest, has, by the provisions of the 11th section of the Act, a species of property available, to the extent of its worth, for creditors.

Having submitted these reasons in favor of the view that the inchoate right is an assignable interest and subject to execution, I shall in my next letter attempt an examination of the case of *Allan* v. *Edinburgh L. A. Co.*, 19 Gr. 248, which is a decision to the contrary.

E. D. A.

Toronto, August, 1877.

Sheriffs Duties—Returning Fi. Fa.'s for Renewal.

To the Editor of the Law Journal.

Sir,—Of late there has been a considerable amount of discussion in regard to the duties and emoluments attached to the office of sheriff. As the matter now stands the sheriffs have been able to exercise sufficient influence at "head quarters" to have their income largely increased without incurring any further responsibility or having additional duties to perform. I do not wish to discuss whether persons holding offices of this description, which require no previous training and no intellectual attainments to qualify them to fulfil the duties attached thereto, should receive salaries equal to, and often exceeding the remuneration which is derived from the exercise of the learned professions, but I think that if the next "Omnibus Act" passed by our Local Legislature were to extend the duties of the sheriff somewhat, it might be beneficial, not only to the legal profession but to their clients also. The law with regard to an attorney's retainer to carry on a suit, I believe to be that such retainer is an authority to prosecute the suit unto the entry of final judgment only. Special instructions should, in strictness, be given to the attorney to issue execution. Writs may then be placed in the sheriff's hands which lose their priority in a year. Neither the sheriff nor the attorney is legally bound to notify the client that the writ is about to expire, and it frequently happens that the client loses his debt through neglect to renew the writs. Now in a large firm of attorneys when writs are usually issued by articled clerks, the risk would be great to the attorney if he were saddled with the responsibility of renewing writs issued on all judgments he had entered for years back perhaps; but what could be simpler than to make it the duty of each sheriff to return writs to the party placing them in his hands say a week before the day on which they expire, giving such party notice at the same time that if not renewed the plaintiff's priority would be lost?

Yours truly,

Lex.

[The suggestion is a good one, and would be of great benefit to the profession and to the public, and very little trouble to sheriffs. These officers are as well paid for doing nothing as most people, and it would be well to give them something to do for nothing, by way of variety.—Eds. L. J.]

Invaders of the Profession.

To the Editor of the Law Journal:

Sir,—During the last year I have noticed that you have referred in your journal to some peculiar "professional cards;" but I think that none of them are equal to one which came under my own observation a short time ago. It appeared in two of our country newspapers, and is as follows:

J. A. H., Notary Public, Conveyancer Life Insurance Agent, Accountant, &c., law business matters attended to. Office next door to J. F. D. N. B.—As it may not be generally known, the public are therefore respectfully notified that the law gives to the above named the exclusive right of conveyancing in this locality. And any infraction of the same is subject to penalty.

E., April 24, 1877.

This has been published for three months, immediately succeeding Mr. H.'s appointment as a Notary Public. The phraseology is, to me at least, quite unintelligible. For instance, I do not know whether or not, "law business matters" is a more comprehensive term than "legal business," and I am just as much in the dark as to what the bounds of this locality may be, and what the penalty is which would follow an infraction of Mr. H.'s right. If you could elucidate some of these points, you would much oblige,

Yours truly,

Student-at-Law.

[The number of persons likely to be intimidated by such a trick as this is doubtless very limited, and the advertiser is probably too well known in his own locality to require at our hands a label of "mad dog," or "this ferocious animal is quite harmless;" but we would suggest that the attention of the Attorney-General should be called to his dishonest, though absurd pretension, for it is evident he is not a proper person to be entrusted with the office of a Notary Public.—Eds. L. J.]

REVIEWS.

The Insolvent Act of 1875 and Amending Acts. Annotated by S. R. Clarke, Esq., of Osgoode Hall, Barrister-at-Law. Toronto: R. Carswell.

This work will supersede, to a great extent, the annotated editions of the Insolvent Act by Mr. Edgar and Mr. Macmahon. It contains the Amended Acts and brings the cases down to a later date and much more care and research have been bestowed in its preparation than in the previous works on the same subject. Mr. Clarke has most industriously collected and carefully arranged a mass of cases selected from a variety of sources; he has not merely done this, but has not been afraid to express his own opinion on points of doubt or difficulty, evidently after a full consideration of the authorities. From the wide range of the editor's research, his book will be of equal value in all the Provinces of this Dominion, for not only does he refer to the cases reported in their various courts, but gives other useful information, *ex gr.* as to articles exempt from seizure under different Provincial statutes, lists of official assignees in Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island, Manitoba and British Columbia, &c. We can fancy also that this volume will find considerable sale in such places in the United States as do business to any extent with Canada. Mr. Clarke has succeeded in producing a book which shews him to be a careful and industrious annotator well acquainted with the subject before him. The book will be of much practical use both to his professional brethren and to the large number of business men, such as official assignees, &c., whose duties require them to become familiar with the working of the Insolvent Acts.

CHANGES IN CIRCUITS.

The Autumn Assizes will begin at London on Tuesday, the 23rd October, instead of Tuesday, the 4th September, as stated in our last number, the commission day having been since changed.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Easter Term, 40th Victoria.

DURING this Term, the following gentlemen were called to the degree of Barister-at-Law :—

Haughton Ignatius Lennox.
Henry Peter Milligan.
Charles Henry Woodward.
Lafayette Alexander McPherson.
Elgin Myers.
James Fullerton.
Robert Scarth Smellie.
Jasi Alexander Morton.
John Folinsbee, Jr.
David Robertson.
Harry Dudley Gamble.
John James Kehoe.
John Maxwell.
Ancus Martius Peterson.
William Daniel Foss.
Campbell Wm. Sawers.
John W. H. Wilson.

The following gentlemen passed the examination for admission as Attorneys :

James Vernal Tentzel.
Thomas Gibbs Blackstock.
Lafayette Alexander McPherson.
Walter Barwick.
Elgin Myers.
Thomas E. Lawson.
James Fullerton.
Ancus Martius Peterson.
Robert Scarth Smellie.
Campbell Wm. Sawers.
J. Franklin Monk.
Malcolm G. Cameron.
John Bishop.
E. Campion.
Peter Levington Palmer.
E. H. Eddis.
Frederick Montye Morson.
Hugh Blair.
Sydenham Baldwin Hall.
W. J. Clarke.
Harry Dudley Gamble.

The following gentlemen were admitted as Students-of-the-law:

Murray Clement Biggar.
Charles Wilson Plaxton.
Wm. George Wilson.
Alex. Aird Adair.
Charles Edward Jones.
John A. Robinson.
Andrew Taylor G. McVeity.
Geo Wm. Meyer.
Thomas Smithson Hill.
Thos. Alpheus Snider.
Wm. James Nelson.
Wm. Hutchinson Hewson.
Archibald James Sinclair.

And the following gentlemen as articled clerks :

Wm. Burgess.
David Birmingham.
Francis Arneil.
John C. Delaney.
Wm. Henry Hastings.

Ordered, That the division of candidates for admission on the Books of the Society into three classe be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission as Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects :—

CLASSICS.

Xenophon Anabasis. B. I.; Homer, Iliad, B. I. Cicero, for the Manilian Law ; Ovid, Fasti. B. I., vv. 1 300 ; Virgil, Æneid, B. II., vv. 1-317 . Translations from English into Latin ; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic ; Algebra, to the end of quadratic equations ; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar ; Composition ; An examination upon "The Lady of the Lake," with special reference to Cantos v. and vi.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian wars, both inclusive. Ancient Geography : Greece, Italy, and Asia Minor. Modern Geography : North America and Europe.

Optional subjects instead of Greek :

FRENCH.

A paper on Grammar. Translation of simple sentences into French prose. Corneille, Horace, Acts I. and II.

or GERMAN.

A paper on Grammar. Musaeus, Stumme Liebe Schiller. Lied von der Glocke.

Candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), are required to pass a satisfactory examination in the following subjects :—

Ovid, Fasti, B. I., vv. 1-300,—or
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

A Student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk, (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

All examinations of Students-at-Law or Articled Clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

THOMAS HODGINS, *Chairman.*

Osgoode Hall, Trinity Term, 1876.

Adopted by the Benchers in Convocation August 29, 1876.

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THE
Canada Law Journal.

September, 1877. Second Number.

CRIMINAL STATISTICS.

COMMUNICATED.

A return to the Legislature of Ontario respecting felonies and misdemeanours brought before "The County Judges Criminal Court" during the year 1876, discloses some very interesting particulars. Owing to the carelessness or want of apprehension of those who were required to make the returns, they are not as complete as they ought to be. It is therefore impossible to make a complete analysis; indeed, the returns for three counties, under the columns, "the *nature* of offences," give merely, so many "felonies" and so many "misdemeanours," instead of setting down, as required, the *specific offence* charged in each case If County Crown Attorneys keep a proper account and record of the proceedings conducted by them, one hour should suffice,* in most cases, to fill in the returns so as to give the detailed information sought for. It is to be hoped that future returns will be more complete.

The return referred to comprehends all the cases of commitment for trial in all the gaols in the Province, for indictable offences of all kinds, except capital felonies and a few others, and is intended to show the particular crimes charged and how they were disposed of, whether tried by judge without a jury, or tried by jury at the ordinary Courts, and the result. The whole number of cases brought before the Local Judges in this Province for the year 1876 was 1181. And, in the option given by law to persons charged with crime, 959 of the number committed exercised their right of choice in favor of trial by judge alone, without a jury; the rest, 222 in number, claimed to be tried by jury for the offences charged against them. In respect to the former class, those tried by judge alone, the number of convictions was 727, the number of acquittals was 232; of those tried by jury in the ordinary Courts, 104 were convicted, and 118 were acquitted. Thus, in trials before the judge alone, the acquittals were in the proportion of nearly one third to the convictions before them. In the trials before the jury more than one half were acquitted. It is difficult to account for this difference in result without additional information; one can only remark, that it is extremely improbable that a judge acting alone, and fulfilling the functions of a jury, would convict in any case in which there was any reasonable doubt of the guilt of the accused; that the tendency with a jury may possibly be to entertain as a doubt

* The writer had occasion recently to obtain a similar and fuller return from a Crown Attorney embracing over seventy cases, and it was prepared within an hour. The officer's books were properly kept.

that which merely involves a thoughtful consideration and reasoning upon controverted facts in evidence before them—a reluctance in some cases to draw a conclusion from facts and circumstances proved, particularly in cases where intention may be inferred from circumstantial evidence. The true causes of difference in result referred to, must after all, in the absence of full facts, be left to the domain of conjecture.

With respect to the *nature* of the cases, owing to the defect already referred to, some 321 of the offences charged cannot be classified; of those that remain and were tried by the judges, no less than 459 were offences of fraud *without violence*, as ordinary larcenies, embezzlement, false pretences, &c. The offences of fraud *with* force, as robbery, burglary, &c., amounted to 55. The offences *purely of force*, as felonious and other assaults, unlawful wounding, stabbing, &c., numbered 93. The offences *against authority*, as rescue, escape, assault on constable, &c., were only 8 in number. Offences touching social relations, as bigamy, child desertion, concealing birth, &c., numbered 9. Miscellaneous cases include 8 cases of arson, 1 of beastiality, one of counterfeiting coin, 3 of malicious injuries of property, and one of sending threatening letter. In all 14 cases.

In looking at this rough analysis, the number of larcenies and of kindred offences of fraud appear to be very large in a new country like ours, with a not over crowded population, and where there is generally work of some kind for all; and the same may be said of offences of fraud with violence. The more serious crimes of violence and force may to some extent be accounted for by our mixed population, and by the moving portion of it, transitory persons, using the great highway through the country; but still they are deplorably large. The recent act against carrying firearms, will, it is believed, tell favourable on this item in future returns. A very prominent and gratifying feature is presented in the few cases of offences against authority, numbering only 8 for the whole Province, seeing that criminal police is executed mainly by the old fashioned sessions-appointed constable in all the rural parts of the country, that only in our cities the modern and improved organized system of police constabulary prevails. The small number of cases of the class referred to tell unmistakably of the respect to law and authority pervading the inhabitants of this free country. It is noteworthy, too, that offences touching natural and social relations, so numerous in other countries, are almost unknown in this Province, only 4 of the 9 cases under this head being of a serious character.

Under the head of miscellaneous offences are 8 cases of arson, a crime almost unknown amongst us a few years ago, but markedly on the increase. Whether this is due to the restless canvass of agents in the keen competition amongst the fire insurance offices from other countries, with the temptations to fraud in cases of over insurance, it is not easy to say, but the fact remains. The crime of arson is on the increase, and it is believed that only a small proportion of such cases come before the courts.

The whole number of cases is by no means equally distributed over the Province or amongst the counties, and population, situation, or age of the counties, gives little clue to an estimate of crime in each. In some counties the cases have been numerous, in others very few. Thus, in seven Counties, namely: Carlton, Lennox and Addington, Peterborough, Prescott and Russel, Prince Edward, Stormont, Dundas and Glengarry, and Algoma (District), the cases in each, tried by judge without a jury, did not exceed 10 in number. Eleven Counties had each over ten, but not exceeding 20 cases, viz:

Brant, Frontenac, Grey, Halton, Hastings, Lanark, Leeds and Grenville, Northumberland and Durham, Peel, Perth and Renfrew. Seven Counties had each over 20, but not exceeding 30 cases, viz: Bruce, Kent, Lambton, Lincoln, Victoria, Wellington and Wentworth. The Counties having over 30, but not exceeding 40 cases were five, viz: Elgin, Essex, Haldimand, Welland and York. Two Counties, Oxford and Waterloo, had each over 40 and not exceeding 50 cases. Three Counties, Huron, Norfolk and Ontario, had each over 50, but under 60 cases, and in two Counties only, Middlesex and Simcoe, the number of cases tried by the judge exceeded sixty. The largest number of cases so tried was in Middlesex. The smallest number in Prince Edward. It is worthy of note that the old Counties of Stormont, Dundas and Glengarry, Leeds and Grenville and Prince Edward, together, had not half as many cases as any of the younger Counties of Huron, Victoria, or Waterloo, and again, the smaller Counties of Elgin, Oxford and Essex, show each, more than three times as many cases as the large Counties of Hastings, Peterborough and Stormont, Dundas and Glengarry. The populations, to a certain extent, were in accordance with the returns. The Counties with the largest populations, such as Simcoe and Middlesex, had the largest number of cases.

In the very imperfect state of the published returns at the present, there is scarcely full data to reason upon, but any analysis of the existing material will at least be interesting to those who make the subject their study, and it is with this aim the present paper has been prepared.

The subject of criminal statistics has received very little attention in Canada till of late years. The Act of 1876 for the collection of criminal statistics, however, must do much to supply this serious omission, and its complete provisions will enable valuable information to be obtained and compiled for the information of Parliament and all concerned with the interesting subject of criminal statistics.

ASSESSMENT APPEALS.

We publish on another page some assessment cases of general interest. Those from the County of Simcoe involve highly important considerations of public policy in relation to the much-vexed subject of exemption from taxation. The judgments of the learned judge will doubtless have a tendency to change many assessments in similar cases where an erroneous impression (founded on a somewhat impudent assumption) has prevailed to the detriment of the public.

The judgment of the junior Judge of Leeds and Grenville in the other case referred to above affects a question of some practical importance; we doubt, however, whether he is right in his conclusion. The decision is to the effect that a person whose name is on the assessment roll for the year 1877, but not for 1876, is not a "municipal elector" qualified to lodge an appeal from the assessment. It is based upon the sec. 77 of 36 Vict. cap. 48, which, in speaking of those who are "the electors of every municipality," says "all which electors shall have been severally rated on the last revised assessment roll for real property in the municipality."

It must be remembered that the appeals were lodged under the Act of 32 Vict. cap. 36, sec. 60, sub-sec. 2, which provides the machinery for "working" appeals to the Court of Revision. Had these appeals been lodged before the Act of 36 Vict., reference, as to who was a municipal elector, must have been had to 31 Vict. cap. 30, sec. 9, which is an amendment of 29-30 Vict. cap. 51, sec. 75—the only amendment (needed here to be noticed), being the omission of the word "then," before "last revised assessment roll."

It was urged that though the appellant's name was on the roll for the present year, the roll was not revised and that perhaps he had no right to be entered on it. The utmost that this argument could be stretched to would seem to be that the possibility of this appellant having no right to be on the roll (although this right so far had not been attacked) should deprive him of the right to see that the franchise, as, it affected him, was *not* improperly or *was* properly, conferred—while a perfect stranger, one who might possibly be living elsewhere, and who might have no interest whatever in the municipality—might come forward and claim such a right. This clearly cannot be the *spirit* of the law—and we should be inclined to look at in this way: the one Act (32 Vict.) relates to the machinery necessary to complete and revise the roll, on which voting is subsequently to take place. The other Act (36 Vict.) relates (*inter alia*) to certain things which are to take place subsequent to the revision of the roll, viz., *voting*, &c. In it, the words "The electors of every municipality" are used, and they are used in reference to those who are *qualified to vote*.

In the 32nd Vict. the words used are "a municipal elector;" and they are used with reference to proceedings to be taken to determine who are to be the "electors of the municipality" for the current year. Now, if a man's name be on the roll for 1877, even though the roll be not revised, he is, *prima facie*, an elector—the maxim, "*omnia presumuntur rite esse acta*," must have force here. True, there are two contingencies, and contingencies only, which may take place, to deprive them of their *prima facie* right,—those are (1st) that his name *may be* struck off on the final revision of the roll, and (2nd) that an election *may* take place, before the time when the rolls for the present year could be used.

Again, the man whose name is on the last year's roll, but not on this year's, has to all intents and purposes ceased to be "an elector," and he could not be considered such, unless in view of one of the above contingencies happening, viz.: an election taking place before the new roll could, under the Act, be used—a thing which very seldom happens.

Suppose this to be the case of a township newly organized, where there is no "last revised roll," and no *last* roll at all. If the view taken were to prevail, *there could be no appeal*, and frauds to any extent could be perpetrated, or suppose (an unlikely case we admit) that the names on this year's roll were all new and that none of the last year's "electors" could be induced to act as appellants (they having no interest in the matter) the same state of things would prevail.

Finally, the one allowed to appeal *may* have no interest whatever in the matter—the other has every interest, but his mouth is shut. We should, therefore, be inclined to reject all reference to 36 Vict. as not bearing in any way upon the matter in question and as not in any way affecing those parts of 32 Vict. relating to appeals of this sort—and reject it all the more, as, interfering with the just and equitable working of the Assessment Act, and as not intended in any way by the Legislature to apply to, over-rule or explain that act.

LAW SOCIETY.

Easter Term, 40th Victoria.

The following is the *resumé* of the proceedings of the Benchers during this Term.

Monday, 21st May, 1877.

The Treasurer laid before Convocation the reports of the Examiners shewing the results of the examinations for Call, for certificates of fitness and of the Intermediate Examinations.

The gentlemen whose names appear in the usual lists were called to the Bar, and received certificates of fitness.

Tuesday, 22nd May.

The report of the Examining Committee, showing the result of the Preliminary Examinations was laid before Convocation.

The Balance Sheet for the first quarter of 1877 was read.

The resignation of Mr. Kenneth McKenzie, Q.C., was laid before Convocation.

On motion of Mr. Read, seconded by Mr. Irving, it was ordered that Mr. McKenzie's resignation be accepted, and that the Treasurer reply to Mr. McKenzie's letter, expressing the regret of the Benchers for the loss of Mr. McKenzie's assistance, and acknowledging the long and valued services rendered to the Society by him as a member of Convocation and as Chairman of the Library Committee.

The petitions of S. Sutherland and H. C. Jones were refused.

It was ordered, that a special meeting of the Benchers be called for the first Tuesday of Trinity Term, next, for the election of a Bencher to fill the vacancy caused by Mr. McKenzie's resignation.

Mr. Hodgins gave notice that he would on Saturday, 26th May, move that the Treasurer and the Chairmen of the several standing committees constitute an Executive Committee of Convocation with powers to appropriate from time to time such sums as may be required for expenditure by the standing committees, and to have the executive management and control of such portions of Osgoode Hall and the grounds attached thereto as are in the exclusive occupation of the Society. That no standing committee incur any expenditure in respect of the Law Society without the previous sanction of the Executive Committee.

The petition of various students was read, asking that the ensuing Trinity Term examinations be held.

Ordered, That the Preliminary, Intermediate and Final examinations for Trinity Term next be held as usual.

Saturday, 26th May.

Mr. Read moved, seconded by Mr. Crickmore, that the Hon. Stephen Richards, Q.C., be re-elected Treasurer of the Society.—Carried

The Finance, Library, Reporting and Legal Education Committees were elected.

Mr. Osler gave notice that at the meeting of Convocation to be held on the last Tuesday in June, next, he will move that there be a standing committee on discipline.

Moved by Mr. Senkler, seconded by Mr. Martin, that from and after the 1st July 1877, the sum of four hundred dollars annually be paid to Mr. John Molloy during his life by quarterly payments in advance, as a retiring allowance in view of his long and faithful services as Steward of the Law Society, and that he be relieved from the further performance of the duties of Steward.—Carried.

Mr. McKelcan moved, seconded by Mr. Read, that the office of Steward be abolished from and after the first day of July, and that Rule 102 of this Society be amended accordingly, and that Rule 123 be repealed, that the Secretary, under the direction of the Finance Committee, shall have the general charge of the grounds and buildings thereon which may be in the exclusive occupation of the Society, and shall have authority with the concurrence of the Treasurer and Finance Committee to employ such person or persons as may be required from time to time to perform the duties now or formerly appertaining to the office of Steward, and to pay therefor such compensation as may from time to time, with the concurrence of the Treasurer and Finance Committee be agreed upon.

Mr. Robertson moved, seconded by Mr. Crickmore, that the salary of the Secretary be increased to two thousand dollars per annum.—Carried.

On motion of Mr. Martin, seconded by Mr. Lees, it was ordered that the Secretary, for the time being, be required to give security by bond of guarantee company to the extent of five thousand dollars for the due performance of the duties of his office, the Society to pay one half of the premiums therefor.

Ordered, That Mr. Hodgins' notice of resolution, relative to constituting an Executive Committee of Convocation, do stand for the meeting of Convocation to be held on last Tuesday of June, next.

Ordered, That the Petition for Call in accordance with Order number 83 and Form contained in Schedule number 8 shall hereafter be deposited with the Sub-Treasurer at least fourteen days next before the first day of the Term in which the student shall desire to be a candidate.

Ordered, That the report of the Committee to draft rules for the regulation of the proceedings of Convocation be printed for the use of members and be taken into consideration on the last Friday of the present Term.

The petition of Robert Miller was refused.

The petition of Hugh Schliefer was read.

Ordered, That Mr. Schliefer's term of service be effectual from the time of his entering into articles, and that the prayer of his petition be not further granted.

The petitions of Messrs. Hodge and Snider were granted.

Friday, 8th June.

The report of the Law School Examiners was read and confirmed.

The report of the Committee on Reporting was read. The consideration of the communication from the Registrar of the Supreme Court, relative to the reports of that Court was deferred until the next meeting of Convocation. The report of the Committee was otherwise adopted.

The report of the Finance Committee was brought up by Mr. Read.

Ordered, That the subject of all contracts with the Government as to heating and lighting Osgoode Hall, and the care of the grounds be referred to a committee, composed of Messrs. Hodgins, Maclennan, Smith, Irving, Read and the Treasurer. The further consideration of the report ordered to be deferred until next Term.

The petitions of Messrs. Blackstock, Baines, Hardy, Martin and Macnee were disposed of.

The petitions of Messrs. Wilson, Robinson and Shaw were granted.

The petition of Matthew Wilkins, jr. was referred to the Committee on Legal Education.

The petition of the Municipal Council of the Township of Townsend was referred to the Committee on Discipline.

The report of the Committee to draft rules respecting the proceedings of Convocation was adopted.

Mr. Hodgins was elected representative of the Law Society in the Senate of the University of Toronto until Easter Term next.

Tuesday, 26th June, 1877.

The report of the Committee on Legal Education on the petition of Matthew Wilkins, jr., recommending the refusal of its prayer was adopted.

The report of the same committee on the petitions of Edward Betley Brown and William Nesbitt Ponton was not adopted.

A letter from the Registrar of the Supreme Court was laid before Convocation stating that the Government were willing to supply the reports of the Supreme Court at one dollar per volume of 750 pages.

Ordered, That the Secretary do subscribe for nine hundred copies of the Supreme and Exchequer Court Reports at one dollar per volume, and that a copy of said reports be supplied by the Society to each member of the profession who has taken out his certificates.

Ordered, That a copy of the Ontario Reports, published by the Society, be furnished to the Registrar, and another copy to the Judges library of the Supreme Court.

Mr. McKelcan moved, seconded by Mr. Bethune, that all the Ontario Reports be henceforth supplied to the Judges of the County Courts of the Province at the expense of the Law Society, commencing with the first numbers of the current volume of each series, and that the Secretary give instructions to the publishers accordingly.—Carried.

Ordered, That Mr. Hodgins' notice of resolution, relative to an Executive Committee, do stand for the meeting to be held on first Monday of Trinity Term.

Ordered, That Mr. Boswell and Mr. Black be appointed Auditors for the current year.

Ordered, That Mr. Evans be appointed Examiner for Matriculation for Trinity Term.

Ordered, That Mr. McCarthy's notice of motion to rescind the standing orders passed under 39 Vict. cap. 31 and to substitute other orders in place thereof do stand for the first Monday of next Term.

SELECTIONS.

CURIOSITIES OF ENGLISH LAW.

(Concluded from p. 250.)

By creating a forfeiture to take place on the happening of any specified event, the intention of the testator, in whatever terms the clause of forfeiture may be framed, is that the legatee shall enjoy his bounty until the happening of that event, and no longer, and such intention is rendered neither more nor less evident by the circumstance of its being expressed in terms importing a limitation rather than a condition. The most disheartening part of the business is that this silly verbal quibble is not a legacy of the past, but, on the contrary, has only been fully established within the last forty years. There are several cases where a condition expressed in terms bearing a remarkably close resemblance to a limitation has been held to be void, and we have been unable to find any definite authority (except some dicta in an old case of *Low* v. *Peers*, Wilmot, C. J., 369) affirming the validity of limitations in general restraint of marriage, until the well-known case of *Morley* v. *Rennoldson* (2 Hare, 570) before Vice-Chancellor Wigram, in 1843, who says (p. 579): "Until I heard the argument of this case I had certainly understood that, without doubt, where property was limited to a person until she married, and when she married then over, the limitation was good. It is difficult to understand how this could be otherwise, for in such a case there is nothing to give an interest beyond the marriage. If you suppose the case of a gift of a certain interest, and that interest sought to be abridged by a condition, you may strike out the condition, and leave the original gift in operation; but if the gift is until marriage, and no longer, there is nothing to carry the gift beyond the marriage."

With all due deference to the learned Judge, we fail to see how any difficulty, much less any insuperable difficulty, can arise from the circumstance "that in a gift until marriage and no longer, there is nothing to carry the gift beyond the marriage." On this point we may observe, first that this remark does not apply to gifts "until death or marriage," which words are held to create a valid limitation, and secondly, that when a testator gives an estate until marriage, he must be held to contemplate even if he has not in terms provided for, the contingency of the donee never perpetrating the proscribed offence of matrimony, and therefore a gift until marriage, although it does not in so many words confer a life interest, is clearly equivalent to an estate until death or marriage. This construction is, in fact, a simple application of the doctrine of estates by implication, a doctrine well known to the

Court of Chancery. If there is a gift over on the death or marriage of a donee, the intention becomes, if possible, even more obvious; if, on the other hand, the estate of the donee is enlarged by means of a power or otherwise in the event of his or her dying unmarried, such a disposition is equivalent to an original gift of such enlarged interest subject to a condition in restraint of marriage. But supposing a difficulty might arise, though in no case that we are aware of could any such difficulty have in fact arisen, as to the amount of the estate given in the event of celibacy, surely rather than allow a rule of policy to be evaded by the silliest of quibbles, the difficulty should be boldly faced, as many difficult points of construction have before now been faced, by the Court. We think that the arm of the Court, which is constantly represented as being long enough to reach, and strong enough to defeat, any attempted evasion of its rules whereby a person purports to effect indirectly what he could not have effected directly, has in this case been paralysed by excess of caution. It is not every Judge who regards the present state of the law with as much complacency as Vice-Chancellor Wigram. Lord Justice Knight-Bruce said (*Heath* v. *Lewis*, 3 D. M. & G., 954): "It must be agreed on all hands that it is by the English law competent for a man to give to a single woman an annuity until she shall die or be married, whichever of these two events shall first happen. All men agree that if such a legatee shall marry, the annuity will thereupon cease. But this proposition has been advanced—a proposition which, if true (and I do not deny its truth), is perhaps not creditable to this English law—that if a man give an annuity to a woman who has never married, for life, and afterwards declares that, if she shall marry, the annuity shall be forfeited, the condition is void, and she may yet marry as often as she will, and retain her annuity." We are unable to see the logical necessity for a distinction, of which the absurdity was apparent to the Lord Justice. We hold that a trifling modification of the doctrine applicable to conditions would suffice to meet the case of limitations.

Where a void condition purports to bring an estate to a premature end, the law interferes, and, by ignoring the condition, allows the estate to run its course. Now let us suppose that an estate purports to come to an end, not through the instrumentality of a void condition, but by the occurence of an event which the Law has decided ought not to be permitted to have an injurious effect on the interest of the donee, surely the simple and obvious plan of vindicating the policy of the Law would be to ignore the occurrence of the event, and to let the estate run on just as if nothing had happened; if a gift is limited until marriage, let it run on in spite of marriage, just if the donee had remained single. We venture to say there is not a man of ordinary intelligence, outside the profession, who would hesitate for five minutes in casting aside, as so much hurtful rubbish, all the fine-spun distinctions between conditions and limitations which have been at once the delight and perplexity of the Bench from time immemorial, and by means of which the law of conditions in restraint of marriage has been deprived of every claim to indulgence. To the vice of perplexing and unnecessary distinctions, resulting in absurd and contradictory decisions, must be added this, the sufficient condemnation of any law, however perfect in every other respect, namely, that all its provisions may with ease and certainty be evaded. In vain do the Judges decide, in vain do Counsel argue, if every principle contended for by the latter and enunciated by the former can be set aside by the machinations of a draftsman.—*Law Magazine.*

Baron Dowse preserves in Ireland that directness of speech and forcible way of putting things that endeared him to the House of Commons. The other day he was trying a shoemaker who was charged with having stabbed his wife. The guilt was brought home to the prisoner beyond all dispute, and indeed the man did not deny having committed the offence. Some of the jury, however, sapiently observed that he "did not see any clear evidence that the knife produced had inflicted the wound." "If you were trying the knife," said Baron Dowse, "such evidence might be very essential, but you are trying a prisoner, and the question is whether or not he inflicted the wound with that or any other knife." Then the jury began to see it, and the man was eventually convicted.—*Mayfair.*

CANADA REPORTS.

ONTARIO.

ASSESSMENT CASES.

(Reported for the *Canada Law Journal*).

In re Appeal of the Very Rev. Dean O'Connor, from the Court of Revision of the Town of Barrie, County of Simcoe.

Exemption from taxation—Parsonage—32 Vict. cap. 36, sec. 9, sub-sec. 22, O.

The appellant was a Roman Catholic "Parish Priest" for the town of Barrie, and resided with the Rev. J. Giprie on the property in question, which was assessed to the appellant at $2,800. The appellant claimed that there should be an exemption of $2,000 as to each occupant, the property not exceeding in the whole four acres. Mr. Giprie boarded with Mr. O'Connor, who had control of the premises, acting generally as his assistant, and doing duty as well at some stations outside of the town.

Held, that there could only be an exemption to the extent of $2,000, in favour of the person having the dominant right or interest in the property.

[Barrie, August 27, 1877.]

The facts of the case appear in the judgment of

Gowan, Senr. Co. J. — This appeal is made on the ground that the property assessed to the appellant, being valued at $2,800, and the house being occupied by him and the Rev. J. Giprie, and each being entitled to an exemption of two acres and $2,000, which would overrun the whole quantity of land and the assessed value, there is an entire exemption; that is, it is claimed there should be an exemption, as to each, of $2,000, equal to $4,000, both occupying the house.

The appellant was appointed "parish priest" for Barrie, to which office the residence is attached, some six years ago; and entered and continued an incumbent and "parish priest" from that time till now. The Rev. Mr. Giprie came here four years ago. He attends services on Sundays at two places out of town, places not attached to Barrie; but does duty for the appellant during the week, when called upon by him. He has no right or control over the property; this right is in the appellant, who pays the expenses of the establishment. Mr. Giprie eats, drinks, and sleeps in the place. When there he occupies a sleeping apartment, and uses the sitting-room. In the absence of the appellant he would be in control, but is subordinate to the appellant; and, as I understand, the position of Mr. Giprie is that of a curate or assistant to the appellant—the incumbent of the place.

The building is for the priest ministering in Barrie, and the estate is vested in trust for that purpose in the Roman Catholic Ecclesiastical Corporation of the diocese of Toronto.

The question is whether this property not exceeding four acres, and not exceeding $4,000 in value, should be wholly exempt. Any technical difficulties as to this appeal I would not feel disposed to give effect to, unless plainly obliged; nor am I called upon to consider them, for the Corporation, as well as the appellant, desire a judgment on the main point.

Before referring to the particular sub-section under which it is contended the claim of exemption has support, I would observe that the taxation of property in this province is designed to provide means for the payment of the expenses connected with the maintainence of our municipal and educational systems, local improvements, the administration of justice, and other purposes, in the public interest, defined by law. In justice, the burden of taxation should fall equally upon the whole rateable property in a municipality. All property-holders should contribute to pay for benefits which all alike enjoy; and so the rule, as enacted, is, "that all land and personal property in the Province of Ontario shall be liable to taxation;" but this rule is made subject to certain exceptions, *i.e.*, exemptions. Exemptions from taxation, whether in favor of individuals or associations, amount, in effect, to compulsory contributions—a statutory benevolence—from the ratepayers at large for the benefit of certain individuals or associations. When the Legislature has provided for the exemption of certain individuals or certain property from taxation, I think it must be shown that the particular claim for exemption comes clearly within the letter of the statute; for I entirely agree with the learned author of *The Municipal Manual*, that provisions creating exemptions of the kind should be strictly constructed. It is under sub-sec. 22 of sec. 9 of the General Asesssment Act (Harr. Mun. Man. 529) the appellant makes claim for exemption. The sub-section reads as follows. "The stipend or salary of any clergymen or minister of religion, whilst in actual connection with any church and doing duty as such clergyman or minister, to the extent of one thousand dollars, and the parsonage or dwelling house occupied by him, with the land thereto attached, to the extent of two acres, and not exceeding two thousand dollars in value."

The stipend of every clergyman or minister in actual connection with the church to which he belongs, and doing duty as such clergyman or minister, is exempt from taxation. It is personal to himself, dependent only on his connection with his church and performing the duties of his office. But with respect to the provision in the latter part of the sub-sec., I am of opinion that two or more clergymen or ministers cannot claim occupancy of one parsonage or dwelling so as to entitle each to an exemption of two acres of land attached thereto, each of such two acres of the value of $2,000, for that is not so expressed.

It seems to me clear that the enactment refers only to the particular clergyman, parson, rector, incumbent, or minister having chief position charge or control in respect to the church and parish or place, in connection with the religious body to which he belongs. That two acres of land to the value of $2,000, and no more is all that was intended by the Legislature to be exempted from taxation.

The word "occupied" in this section means something more than that of a person simply eating, drinking and lodging—living—in the parsonage or dwelling house. It means, I think, a legal occupancy by some such person having chief if not dominant right, privilege or interest in respect to the property.

Under the construction contended for by the appellant, the whole value of the property assessed (not exceeding $4,000,) would be exempted. The law could, not, in this way, work out uniform results, and might be made to operate in a way more favorable to one religious body than another, which never could have been designed by the Legislature.

The argument, pushed to its legitimate conclusion, would lead to anything but equitable results; and, referring to what I have before said, I think my duty is to adhere to the words of the statute; and the exemption claimed, as presented to me, I do not think comes within them.

I am of opinion that the appeal must be dismissed. The assessment and the decision of the Court of Revision, are confirmed.

I must express my regret that steps were not taken by those concerned to have the points fully argued before me. I should have been glad to be aided to a conclusion in this way. I am not aware, however, that any material point has escaped me; and I think I have arrived at the only conclusion tenable under the statute.

In respect to costs, it may be that the appellant might have presented his complaint earlier and more fully, but I shall not order him to pay costs: for the Court of Revision gave a not over certain sound in pronouncing their decision; and it appears it was the common wish, both of those representing the Corporation and the appellant, to carry the matter to appeal. The appellant will not pay any costs.

Appeal dismissed.

In re Appeal of the Sisters of St. Joseph from the Court of Revision of the Town of Barrie, County of Simcoe.

Exemption from taxation—Incorporated Seminary of learning—Place of Worship—32 Vict. cap. 36, sec. 9, sub-secs. 2, 4, O.

The Sisters of the Community of St. Joseph claimed exemption from taxation of the house and premises occupied by them on the grounds that it was used as a seminary of learning and as a place of worship. The institution to which they belonged was incorporated for the reception and instruction of orphans and the relief of the poor, &c. The building in question was used by the Sisters as a dwelling, and lessons in music were given there, but no school was kept there. A room in the house was set apart for Divine worship.

Held, that the claim for exemption was on both grounds untenable.

[Barrie, August 27, 1877.]

The facts of the case appear in the judgment of

Gowan, Senr. Co. J.—The appellants in this case live in a house which is assessed to them at $700: they occupy it as a dwelling-house. They visit the sick and poor, and perform visits in "the offices of charity and religion" in the municipality. They are also engaged in teaching a school or seminary, but the building in which they teach is not the property assessed. Lessons in music, however, are given by the Sisters in the house they inhabit. There is one apartment in the dwelling used as a chapel for the convenience of the Sisters, and in which there is, as I understand it, religious service held by the priest.

Exemption from taxation is claimed in their behalf on the ground, 1st. That they come within sub-section 4 of sec. 9, as "an incorporated seminary of learning." 2nd. That their house is a place of worship within sub-sec. 3.

With regard to the first (under sub-sec. 4) which reads as follows: "The buildings and grounds of and attached to every university, college, incorporated grammar school, or other incorporated seminary of learning, whether vested in a trustee or otherwise, so long as such buildings and grounds are actually used and occupied by such institution, or if unoccupied, but not if otherwise occupied."

I incline to think that the proper construction of this sub-sec. is, that only buildings connected with the general educational systems of the Province are exempt. That the words: "other incorporated seminaries of learning," in the connection, carries that meaning; at all events, that the "Institution," (to use a term in the sub-sec.), must be one kindred in character to a university, college, or incorporated grammar school. But in any view, I cannot see how this building could be exempt. The school is not held there, but elsewhere. The giving lessons in music in the house cannot make the property a school, and it is not an "incorporated seminary of learning." The Community of St. Joseph is incorporated, certainly. That institution is founded (according to the Act of Incorporation) for the reception and instruction of orphans, and the relief of the poor, the sick, and other necessitous.

There is nothing in these objects to cover or include the idea of a seminary of learning. There may be "instruction," but I fail to see how the fact of giving "instruction to orphans" can give this branch of the Community, in Barrie, as such, the character of a seminary of learning. The actual teaching in their school here may warrant the appellation, but then it is not incorporated as a school held or taught on the assessed premises.

As regards the claim for exemption on the second ground—sub-sec. 3 of the exemption clause is as follows: "Every place of worship and land used in connection therewith, church yard or burying ground."

No doubt the room set apart in the Sisters dwelling may be called a place of worship, as might, in a certain sense, any private apartment in any private dwelling in the town, where there is a family altar, and morning and evening acts of worship performed; but the terms in the Statute are evidently used in their popular sense, i.e., a church, chapel, meeting-house, or other building, intended and used for the public worship of Almighty God. With very few exceptions, such churches or buildings, in this Province, have church-yards and burial grounds attached; such ground is also expressly exempted, and the connection in which the language of exemption is used makes it, to my mind, quite clear what the Legislature intended, in exempting "places of worship" from taxation.

The chief purpose of this building is for a residence. For the convenience of the Sisters, a chapel is fitted up in one part. It would not be easy to say, how an assessment should be made in dealing with an exemption in a case of this kind, if one had to fix the value of the part that is properly a chapel, the dwelling part of the house could scarcely be claimed exempt.

Regarding what I said in the other case, and the considerations I have just adverted to, I can come to no other conclusion than that the property is not exempt on either of the grounds urged; and the assessment and the decision of the Court of Revision is confirmed, without costs, against the appellants.

Appeal dismissed.

In the matter of Appeals from the Court of Revision of the Township of Augusta, United Counties of Leeds and Grenville.

Who is a "Municipal Elector"—Last Revised Assessment Rolls.

The Court of Revision threw out a number of appeals on the ground that the appellant was not a municipal elector within the meaning of sub. sec. 2, of sec. 60, of cap. 36, 32 Vict., inasmuch as his name was not entered upon the Assessment Roll for 1876, although upon that for 1877. An appeal to the County Judge on this point was dismissed.

[Prescott, July 26, 1877.]

One Sidney Rowe lodged a number of appeals against the assessment of the Township of Augusta for the year 1877. Upon the same coming on for hearing before the Court of Revision, they were dismissed upon the ground, that Rowe, whose name was entered upon the Assessment roll for 1877, was not a "Municipal Elector" within the meaning of the Assessment Act, sec. 60, sub.-sec. 2, inasmuch as the name was not entered upon the last revised Assessment Roll, viz: that for 1876. From this decision Rowe appealed to the County Judge.

French appeared for the Township.

Senkler, Q.C. in support of the appeals.

McDonald, J.J.—I am of opinion that the words "a municipal elector," must have some legal meaning, and I do not know where to look for an interpretation of such meaning unless in the Municipal Institutions Acts. When the Assessment Act was passed, the Municipal Institutions Act was the Act of the old Province of Canada, 29-30 Vict., cap. 51, and the 75th section thereof defined who were Municipal Electors. One of the qualifications required was "that the party should be assessed on the "last revised assessment rolls for real property." And in my humble judgment the provisions of the 77th section of the present Municipal Institutions Act also require that a Municipal Elec-

tor "shall have been" rated on the last revised Assessment Roll for real property "in the municipality."

Although the reading of the clause is not so clear upon the point as is that of the 75th section of the Act of 1866, in my opinion Rowe was not under either of these definitions a Municipal Elector, and I therefore think that he was not entitled to be an appellant to the Court below in these matters.

I can see much force in Mr. Senkler's contention, that if this construction prevails, a person may be an appellant who has no interest whatever in this year's assessment, and who, if an appellant, would be at best an intruder. But I must interpret the law as I find it, and entertaining the opinion I do, I must decide that the judgment of the Court below in dismissing the appeals was correct, and I affirm the same and dismiss this appeal. But as the question may be of considerable moment, and it may be considered advisable to have upon it the judgment of a higher Court, I shall not now finally revise the roll but shall adjourn the Court to a future date, with a view of giving the appellant time to take the necessary steps to obtain a mandamus if he be so advised. True the 6th sub.-sec. of the amended 63rd sec. of the Assessment Act provides that "the Judge shall "hear the appeals and may adjourn the hearing "from time to time, and defer judgment there-"on at his pleasure, so that all the appeals be "determined before the first day of August," but I think notwithstanding the judge may continue his Court beyond that date if it be found necessary so to do.

The Court was adjourned until the 30th July, but as no proceedings were taken to obtain a mandamus, the appeals were at the adjourned hearing, dismissed.*

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

CHANCERY.

CAMERON v. SPIKING & TEED.

F. C.] [Sept. 7.

Specific performance—Part performance.

The defendants had agreed to purchase from the plaintiffs, and signed a memorandum in the following terms: "We the undersigned, do hereby agree to purchase the Collingwood Brewery and premises for the sum of $2,000, subject to mortgage of $1,200; malt to be taken at one dollar and fifteen cents per bushel; new barrels to be taken at cost price; old barrels at valuation; Hops at 12½ per pound, and pay freight on the same; Ale at eighteeen cents per gallon; anything else in connection with the brewery not mentioned above to be taken at a valuation; insurance to be transferred to us. Collingwood, March 18th, 1876."

On the 20th of the month, the plaintiffs gave up possession, and the defendants, through their agent, one Radford, entered into possession, and one of the defendants in his examination stated he understood that he had authorized the plaintiff Cameron to tell Radford to brew in the name of the defendants. On the 22nd, Radford took to Spiking $3.00, saying, "This is the first money taken by the Collingwood brewery." Spiking stated that he made no objection, and afterwards he got a dollar, and towards evening the same day, Radford, while in the brewery, told him he had just booked an account, and had put it down "Spiking & Teed." He could not say whether or not Radford showed him the book. Radford had at one time been in the employ of the plaintiffs, but had ceased to be so for a month previously. Two days afterwards, the 24th of March, the defendants having repented of their bargain refused to complete the purchase, whereupon a bill was filed to compel them specifically to perform the agreement. On the hearing, V. C. Proudfoot made the decree as asked which on rehearing before the full court was affirmed with costs.

Spragge C., in the course of his judgment observed: "As to the alleged misrepresentation and the terms of agreement being other than those in the signed paper: looking at the whole of the evidence, I take these to have been an afterthought. They repented of their bargain on Friday the 24th and wished to get out of it. That they looked upon it as a concluded agreement I think is clear. They were willing to forfeit the deposit they had made and to run the risk of such damages as a jury might give, which they thought would be small, if anything. That was a time and an occasion on which they would give all the reasons and state all the grounds, occuring to persons of their class, for retiring from their bargain. They stated none of them but gave as their only reason that the things to go with the brewery came to more

* See our remarks on this case at p. 267, *ante*.—Eds. L. J.

than they expected. If the signed paper had contained the names of the vendors so that the bill might have been founded upon it, these grounds of defence must have failed. They ought really to have no more weight now when it is shewn beyond question who were the vendors with whom the contract was made, and that it was acted upon by the delivery of possession to the defendants; they also accepting and acting upon it."

Blake, V.C., said "There was a concluded agreement between the plaintiffs and defendants, one which the plaintiffs are entitled to have performed, and as to which the defendants have not shewn any reason why they should be absolved from its terms. For sometime previous to the 18th of March the defendants had been thinking of purchasing a brewery, and had been negociating with the intention of buying the property in question. On the 18th of March they agree to buy and then sign a paper to that effect; on the 20th of the same month possession is delivered to their appointed agent. They proceed to take the inventory needed to show the amount they were to pay; they received two sums for beer sold; they negociate with Radford for his employment in their service in the brewery; they have books opened in the name of Spiking & Co. These unequivocal acts entitle the plaintiffs to prove an agreement between them and the defendants, and entitle them to look at the writing not as an agreement to be supplied by parol evidence; but as evidence of a parol agreement."

Keith v. Keith.

F. C.] [Sept. 7.

Practice—Rehearing—Costs.

This was a suit for alimony, the chief ground for relief being desertion, only one instance of personal violence being charged. The answer denied the statements of the bill and said: "I have always been ready and willing, and I am now ready and willing, and hereby offer to receive the plaintiff as my wife whenever she brings my said children back to me."

At the hearing before V.C. Proudfoot, the plaintiff without calling any evidence, declared her willingness to return and live with her husband, and a decree was thereupon made, the husband undertaking to do what he had offered to do by his answer, and the plaintiff on her part returning to him with their children, and he receiving and providing for them, he to pay full costs: if she failed to return to him with her children, the decree gave her disbursements only.

Acting under this decree, the plaintiff did return with her children to her husband, and he received them and provided for their support. But, insisting that the only costs he should be called upon to pay were disbursements only, the statute (32 Vict. cap. 18), providing that "in no suit for alimony in which the plaintiff fails to obtain a decree for alimony, shall any costs be decreed to be paid by the defendant beyond the amount of the cash disbursements properly made by the plaintiff's solicitor," the plaintiff reheard the cause with a view of obtaining a change as to the payment of costs. It was objected that the parties had acted under the decree, and it was now too late for either to complain of its provisions.

In giving judgment, Spragge, C., said, "It does not seem to me to be a serious difficulty that the defendant has—if he has—accepted the decree in its present shape. It is not a decree *by consent*, nor does it appear by whom it has been taken out. * * * The defendant comes before us complaining of one provision in it. How has he debarred himself from making his complaint? We do not know that it has been acted upon. The party to act was the plaintiff, she was to offer herself with their children to the defendant. Was the defendant to lock his door against them, and, unless he did, so to be taken to have acquiesced in the direction as to costs. To place him in such a dilemma would be against public policy,—making a difficulty in the way of reconciliation between husband and wife. Whether the plaintiff has offered herself with her children we do not know, but if she has and if the defendant has received her, then he has not, in my opinion, barred himself from complaining that the direction as to costs is erroneous. In my opinion it is erroneous—the provision in the statute being imperative. It seems to me a hard case upon the plaintiff's solicitors—a case in which, under the law as it stood before the statute which makes the difficulty was passed, the court would in all probability been given full costs."

Blake, V.C., said, "I do not think it necessary to consider whether the decree pronounced is such a one as the court should have granted at the hearing. The defendant submitted to take his wife, the plaintiff, back to live with him—the court granted costs in pronouncing this, otherwise, consent decree. In pursuance of the decree the defendant has, it is alleged, received back the plaintiff as his wife. It is impossible for the court, after the decree has been thus acted on, to open it up. If the defendant was dissatisfied with the addition made to his

consent whereby costs were charged against him, he should have asked that the time specified should be enlarged in order that he might appeal against the decree with which he was dissatisfied: not having taken this course, but having changed the position of the parties by, in the meantime, receiving back his wife, I think he cannot now ask the court to interfere with the decree. The decree must be affirmed with costs."

Proudfoot V. C., concurred in the view expressed by Blake V. C.

Per Curiam—Decree affirmed with costs.—Spragge C., dissenting.

Ontario Bank v. Sirr.

F. C.] [Sept. 7.

Mortgagor and Mortgagee—Priority of Claims.

This was a creditor's suit, in which a conveyance from William Sirr to Alexander Sirr was attacked as fraudulent. The decree set it aside, and directed accounts of what was due to the plaintiffs and other incumbrancers except prior mortgagees. The decree also directed an account of the rents received by Alex. Sirr or to fix an occupation rent, and to make him just allowances in respect of taxes, lasting improvements and payments made by him in respect of the lands or of a certain mortgage thereon, and if a balance should be found in favor of Alex. Sirr the same was declared to be a lien upon the lands *prior to the claim of the plaintiffs*. In default of payment a sale was ordered, the proceeds to be applied in payment of the amounts found due to Alex. Sirr and to the plaintiffs and other incumbrancers in their order of priority. But in the event of the purchase money being found insufficient to pay the amount found due to the plaintiffs, it was ordered that Wm. Sirr should pay the deficiency; and it was further ordered that the amount of such deficiency to the extent of the costs taxed to the plaintiffs should be paid by both the defendants, Wm. Sirr and Alex. Sirr.

The accounts were taken and the land sold under the decree. The land was bid off by Alex. Sirr for $1850, but he failed to carry out the purchase. It was afterwards sold a second time when it produced only $1350.

The Master by his subsequent report of 21st March 1876, found due to the plaintiffs for principal, interest and costs $1143.12, of which the sum of $808.79 was for costs.

The Master also computed interest on $1850, the sum for which the land sold first at $370 making in all the sum of $2220; he then added the amount found due to the plaintiffs $1143.12 to the sum of $1330.79; the amount found due by his former report to Alex. Sirr after deducting an occupation rent, but not calculating interest on it from the date of the first report; these two sums making $2473.91, from which he deducted $2220, the amount of first sale and interest, and found the difference of $253.91 as the deficiency Alex. Sirr and Wm. Sirr were to pay to the plaintiffs. He then deducted $870, the difference between the prices for which the land sold at the two sales (including interest), but not calculating interest on the amount of the last sale,—from the amount due to Alex. Sirr $1330.79, leaving $460.79 as the claim of Alex. Sirr, and from that deducted the deficiency of $253.91, leaving to be paid to the representative of Alex. Sirr, $206.88, out of the money in court after paying the plaintiffs their whole claim.

This report was appealed from, and on the 27th of April 1876, Blake V. C., allowed the appeal and ordered the purchase money in court to be distributed as follows: To the plaintiffs, the sum of $808.79, their costs as taxed and the residue of the money and interest accrued to the representatives of Alex. Sirr.

The plaintiffs reheard this order contending that the decree, by its last clause, ordering that the defendants Sirr was to pay the deficiency to the extent of the costs taxed, in effect gave them priority for their whole debt, interest and costs, over Alexander Sirr; that is that the defendants Sirr to the extent of $808.79 were bound to make good to the plaintiffs the amount of *any* deficiency. On the other hand the representatives of Alex. Sirr insisted that it was only in the event of sufficient money not being left to cover the costs of the plaintiffs after the payment of Alex. Sirr's claim, that they were bound to make good any deficiency, and then only to the amount of the difference between the balance remaining in Court, and the sum of $808.79

Blake, V.C., in giving judgment on the rehearing, said that the reason of the priority given to Alex. Sirr was, that his claim was made up of an amount paid to a prior mortgagee on the premises, and that "by the fifth clause of the decree 'in the event of the purchase money being found insufficient to pay the amount found due to the said plaintiffs, . . . the defendant, William Sirr, is to pay to the plaintiffs the amount of such deficiency.' Then follows the clause on which the bank bases the claim it makes, 'And it is further ordered that the amount of such deficiency to the extent of

the costs taxed to the plaintiffs be paid by both the said defendants, Alex. Sirr and William Sirr.' On this decree it was reasonable that as Alex. Sirr obtains, by means of this suit, payment of his claim, if there should not be realized a sufficient sum to answer the costs of the litigation they should be borne, in any event by the proceeds of the sale. As there was not a sufficient sum produced by the sale to pay the claims of the plaintiffs and Alexander Sirr, by the order made 'the amount of such deficiency to the extent of the costs taxed' was in the first instance charged against the fund in favor of the plaintiffs. Then the money, so far as it would go, was applied on the claim of Alex. Sirr. I think this gave the priority to the bank in respect of its costs, while the decree intended and disposed of the balance so far as it would go in liquidating the claim next in priority—that of Alexander Sirr."

Proudfoot, V.C., in disposing of the case, said, "I think the order was correct. The whole of the provisions of the decree are to be considered. One of these is that Alexander Sirr's claim is to form a lien on the land prior to the plaintiffs' claim. The first clause makes William Sirr liable for the whole deficiency, but Alexander Sirr only to the extent of the taxed costs. The effect of the whole direction then is: the proceeds of the sale are to be applied first in payment of Alexander Sirr's claim, $1330.79, less the difference between the sales, $870 00, or $460.79, then to pay the costs of the plaintiffs: if insufficient for that purpose, both defendants are to the extent of the costs to make it up, and William Sirr is to pay the remainder: or what comes to the same thing, so far as Alexander Sirr is concerned, pay the plaintiffs costs, then Alexander Sirr's claim, then the plaintiffs' claim.

Per Curiam—Order affirmed with costs.

Smith v. Roche.

F. C.] [Sept. 7.

Insolvent Act—Preferential Assignment—Transferee of Mortgage.

This was a suit to set aside a mortgage, as a preferential assignment to one of the creditors of a trader in insolvent circumstances, which was declared valid by the decree pronounced on the hearing before V. C. Proudfoot on the ground of pressure. Subsequently the Court of Appeal determined in the case of *Davidson* v. *Ross*, 24 Gr. 22, that the fact of pressure did not validate such a conveyance and therefore the plaintiff reheard the cause before the full court. In the course of the argument it was made to appear that since the making of the decree Roche had assigned the mortgage to a purchaser for value.

Blake, V.C., in delivering the judgment of the court said that "*Davidson* v. *Ross* in appeal displaces the only ground on which the judgment could be supported, as, apart from the doctrine on which the decree was made as above stated, the transaction is clearly within the Insolvent Act, and is successfully impeached. It is said that the mortgage was, after the decree had been pronounced, assigned to a purchaser for value. The Court cannot interfere with the position of such transferee; and the usual decree, declaring the transaction fraudulent within the Insolvent Acts must be without prejudice to the rights, if any, of such assignee. If the present holder of the mortgage claims to hold it, notwithstanding the present decree, there can be no difficulty in adding him as a defendant and litigating the question in this suit."

Smith v. McLean.

F. C.] [Sept. 7.

Insolvent Act—Preferential assignment—Mortgage to secure contemporaneous advance.

In this suit a decree had been pronounced by V. C. Proudfoot, declaring valid a mortgage executed by one McArthur, a trader in insolvent circumstances, and made within thirty days of his assignment in insolvency. It appeared that at the time of executing the mortgage, McLean, who was one of McArthur's creditors, advanced money to him for the avowed purpose of enabling him to pay his creditors. No fraudulent purpose was imputed to the parties, and the suit was instituted simply on the ground of preference on the principles enunciated in *Davidson* v. *Ross*, 24 Gr. 22. On rehearing the decree was affirmed with costs.

Blake, V.C., in the course of his judgment, observed that the case "was reheard on the proposition that *Davidson* v. *Ross* in appeal governed it—I do not think that this is so. In the present case there was a contemporaneous advance, and an arrangement entered into, which it was supposed would result in enabling the debtor to carry on his business. As the transaction was a *bona fide* one, intended to aid a debtor in discharging his liabilities and to enable him to carry on his business, I think it falls within the principle of *Risk* v. *Sleeman*, 21 Gr. 250, and cases of that class, and not within *Davidson* v. *Ross*, and therefore, that the decree should be affirmed with costs."

Spragge, C., who stated he had read the judgment prepared by his brother Blake, and agreed with him that the decree should be af-

firmed with costs, in the course of his judgment observed, "The evidence appears to me to shew that the transaction was *bona fide*. An advance of money to pay other creditors is not within the mischief of our Insolvent Law. See *Whitmore* v. *Claridge*, 9 L. J. 451.

Exp. Sheen, 1 Ch. D. 560 and *Exp. King*, 2 Ch. D. 256, were cases in which it was held that a security taken for indebtedness and a further advance, the further advance being a substantial one and made in good faith, were not acts of bankruptcy. The case of *Risk* v. *Seeman*, 21 Gr. 250 was a stronger case for the plaintiff than the one now before us. This bill is filed under section 133 of the Insolvent Act of 1875. If the mortgage had been made more than 30 days before the insolvency of the debtor it would have lain upon the plaintiff to prove that it was made in contemplation of insolvency. Having been made within 30 days it lies upon the defendant to shew it was not done in contemplation of insolvency. In my opinion he has succeeded in shewing this. I think the proper conclusion from the evidence is that the contemporaneous advance was in order to enable McArthur to continue his business, applying the sum advanced in payment of creditors, and in the belief, honestly and reasonably entertained, that he would thus be enabled to continue his business."

Per Curiam, Decree affirmed with costs.

HENDERSON v. WEIS.

CHANCELLOR.] [Sept. 12.

Marriage, reputation of.

This was a suit for redemption of land in the Township of Etobicoke. The liability of the defendants to be redeemed by the proper parties was scarcely denied, the principal, indeed the only question really discussed being whether the parents of the plaintiff, Eliza Henderson, were or were not married, her only claim being as heiress-at-law of Obediah Henderson, his daughter by Cordelia his wife. There was no evidence of the marriage—other than that of repute—of Obediah and Cordelia, who were people of colour, in humble life, and who, it was shown, had come to Canada in 1831 or 1832. It was proved in evidence that Obediah, while on his way to Etobicoke to seek for land in company with Cordelia, who was then about to become a mother, was asked by one Long, at whose place he stopped to make enquiries as to land, if that was his wife, to which he answered in the affirmative; that Obediah and Cordelia went to reside in Etobicoke upon a rented farm where the plaintiff was born shortly afterwards. It was also shown that the child was shortly afterwards christened in a Methodist Episcopal Church in the then town of York, presided over by the Rev. Saml. H. Brown, a preacher of that denomination who was himself a colored man; both the parents being then present. The Rev. gentleman, however, kept no record of the baptism; he thought the ceremony was performed in the year 1833-4 or 5. Other witnesses also proved that they lived together and were reputed to be man and wife. On the part of the defence it was proved that Obediah had stated that Cordelia was not and never would be his wife: that in or about the year 1835 they separated, Cordelia taking up her abode with a colored man of the name of Towns, with whom she resided in the town of York and with whom it was reputed she had married; that she was called Mrs. Towns until her death in 1860. Obediah died in 1865, having in the meantime been married to at least one white woman, the last of whom was examined as a witness in the cause.

SPRAGGE, C., thought the evidence of a marriage was too slight to found a decree upon in favor of the plaintiff, and dismissed the bill with costs, observing in the course of his judgment that "It is to be borne in mind that all these—conduct, habit, repute, are no more than items of evidence as to a fact, that fact being marriage—they do not of course constitute marriage. * * * It is not necessary to say how the case would have stood under different circumstances, *e. g.*, if Obediah had by his silence and conduct left his neighbors in the belief that he and Cordelia were husband and wife so that the repute would be that they were so, and if they had lived together until separated by death. As it was, the repute was not uniform or even general except for a short time, and the conduct of both parties was such as in my judgment to outweigh what little repute there was at one time in favor of marriage."

MURPHY v. MURPHY.

CHANCELLOR.] [Sept. 12.

Will—Dower—Election by widow.

The testator by his will devised as follows: "To my beloved wife Ann Murphy I give and devise a full and sufficient support for her natural life; or in case of any disagreement between her and other members of the family I give and bequeath the north part of my house, with an annuity of eighty dollars in cash, to be paid half-yearly. I give and bequeath to her also the use of the well to which she must have free access without any hindrance whatever. I give and bequeath also to my beloved wife all the furniture

in the north part of the house." *Held*, that this had not the effect of putting the widow to elect between her dower and the provision made for her by the will; and that she was entitled to an inquiry as to the sufficiency of the estate to allow her the bequests in her favor, as also her dower, as in the case of *Lapp* v. *Lapp*, 16 Gr. 159.

Paton v. Hickson.

Chancellor.] [Sept. 12

Will—Bequest to executor.

The testator in this case after making some specific bequests devised the residue of his estate, real and personal, "unto William Paton of Johnstone, in Renfrewshire, in Scotland, manufacturer; Joseph Hickson, of the City of Montreal, Esquire; and Thomas Symington, also of Montreal, Esquire; in trust to convert the same; and to divide it into three equal parts * * * And I appoint the said William Paton, Joseph Hickson and Thomas Symington Executors of this my will; and to the said William Paton I bequeath the sum of $5,500; and to the said Joseph Hickson I bequeath the sum of $500, and to the said Thomas Symington I bequeath the sum of $1,500 over and above any expense to be incurred in the nature of travelling expenses, or expenses incidental thereto, and generally in the management of my estate." One of the executors named, for the convenience of the others in carrying on the affairs of the estate, renounced probate of the will and afterwards claimed to be paid the amount of the legacy in his favor. On a bill filed to obtain a construction of the will,

Spragge, C., held that the sum bequeathed was so given to him in his character of executor, and having renounced the executorship he could not call upon the other executors for payment of his legacy.

Williams v. Reynolds.

Chancellor.] [Sept. 12.

Administration suit—Dower.

This was an administration suit. The testator left real estate in which the defendant, the widow and executrix of the will, claimed dower—who, by the Master's report, was found indebted to the estate in $310, and the widow's dower had not been assigned to her, and the plaintiff in the suit—a creditor of the testator—sought to make the dower and arrears of dower available for satisfaction of her indebtedness to the estate.

Spragge, C., thought that if sec. 11 of cap. 90 (C.S. U.C.), or sec. 3 of the Act of 1861, (24 Vict. cap. 41), were in force a question would arise whether sec. 35 of the Administration of Justice Act (1873) would not apply, or rather the principle embodied in it. But these sections have been repealed, and the creditor is without remedy, unless sec. 37 of the Amendment Act of last session will help him. That section revives sec. 8, and amends it so as to read thus: "Any estate, right, title or interest in lands, which, under the 5th section of cap. 90 of the C.S. U.C., may be conveyed or assigned by any party, or one which such party has any disposing power which he may without the assent of any other person exercise for his own benefit, shall be liable to seizure and sale under execution," etc.

This suit had been instituted before the passing of the Act, and a question arose whether its provisions applied to it.

The Chancellor referring to Kent's Com. p. 455, said, "The inclination of my opinion is in favor of the application to this case of the provisions of the Administration of Justice Act, of 1873, and of last session to which I have referred . . . the language of the Act of last session is more comprehensive than that of sec. 8 of the Act of 1861 . . . and the added words were evidently intended to embrace, and I should say do embrace any and every interest which the execution debtor may possess for his own benefit disposable by himself. If that be so, it may be reached under sec. 35 of the Act of last session, (assuming that it may not be reached directly by *fi. fa.*), and if so may be reached in this Court."

Brough v. The Brantford & Port Burwell Railway Co.

Chancellor.] [Sept. 19.

Costs on lower scale.

A bill was filed to enforce an agreement with a Railway Co., and the Master found due the plaintiff in respect of the money compensation agreed to be given a sum of only $187, and the Master allowed him full costs. On appeal the Court held that the Master was right as the suit involved the right of the plaintiff to have fences and farm crossings made and maintained.

Spragge, C., observed. "It appears therefore clear to me that subject matters were involved in this suit, outside of and beyond a pecuniary claim to the extent of $200, and that the suit was, therefore, not within the jurisdiction of the County Court."

IRISH REPORTS.

COMMON PLEAS.

MAGRATH v. FINN.

Privileged communications— Words spoken from the pulpit

Words spoken by a clergyman from the pulpit concerning a parishioner, though in good faith, and for a commendable purpose, are not privileged.

[May 8, 1877.]

The summons and complaint contained three counts, the first of which was as follows: "That the defendant falsely and maliciously spoke of the plaintiff the words following—that is to say (setting out the words in the Irish language), which said words, being translated into the English language, have the meaning and effect following, and were so understood by the persons to whom they were so spoken and published, that is to say: 'Let no man, woman, or child, keep his (meaning the plaintiff's) company, nor talk to him (meaning the plaintiff), and if he (meaning plaintiff) comes into any town-land, tie a kettle to his (meaning the plaintiff's) tail, as the people used to do of old;' the defendant meaning by the said words that the plaintiff had committed an indictable offence of so grave and disgraceful a description as to deserve that the public should avoid and reject the company and conversation of the plaintiff." The second count complained of the speaking and publishing of the words following: "Can any one of you tell me where he (meaning the plaintiff) gets the money to spend? Is his mother foolish enough to give it to him, or does he (meaning the plaintiff) steal cows and horses?" The defendant meaning by the said words that the plaintiff had frequently feloniously stolen, and was in the habit of feloniously stealing, the cows and horses. The third count complained of the speaking and publishing of the words following: "I'll go to his (meaning the plaintiff's) mother to make him (meaning the plaintiff) leave the country, and if not, I'll go to the landlord to make him (meaning the plaintiff) do so." The defendant meaning by the said words that the plaintiff had committed an indictable offence.

In answer the defendant pleaded that he was at the time of uttering the words the Roman Catholic parish priest of the parish where the words were spoken; that at the time plaintiff was a parishioner; that he believed that plaintiff had been guilty of improper conduct; that the conduct was a matter of notoriety, and caused in the parish great annoyance; that at the time of speaking the words he was performing his duty as clergyman in the presence of his assembled parishioners, and that he uttered the words in good faith, believing them to be true, and for the sole purpose of rebuking sin, and preventing a repetition of the acts complained of. To this plaintiff demurred.

Peter O'Brien (with him *Murphy, Q. C.*), in support of the demurrer.

Anderson (with him *Heron, Q. C.*), *contra*, cited *Buckley* v. *Keernan*, 7 I. C. L. R. 75; *Cooke* v. *Wilde*, 5 E. & B. 341; *Spill* v. *Maule*, L. R. 4 Ex. 232; *Harrison* v. *Bushe*, 5 E & B. 344; *Whitley* v. *Adams*, 15 C. B. (N. S.) 392; *Davies* v. *Snead*, L. R., 5 Q. B. 608; *Somerville* v. *Hawkins*, 10 C. B. 583; Starkie on Slander (4th ed.), 526, 527.

Morris, C. J. This action is brought against the defendant, a parish priest, complaining of his use of expressions toward the plaintiff of a slanderous character, and the defence is one of privileged occasion, based on the fact of defendant being a parish priest, and of the duty arising from that office of rebuking and admonishing sinners by name. The argument of the junior counsel in support of the plea, rested the privilege on the relative position of the plaintiff and defendant, and, as flowing from it, a duty to admonish the plaintiff, which, by the demurrer, it is admitted defendant did *bona fide* and believing in the truth of the statement. The case of *Somerville* v. *Hawkins*, 10 C. B. 583, was cited, where a master spoke of a servant in presence of other servants, in words which under other circumstances would have been actionable, but which were there held privileged. But Mr. Heron, for the defendant, claimed a privilege as arising to the defendant as a clergyman, *virtute officii*, of rebuking sin, and, by way of illustration, naming a particular person. There is no authority for such a proposition, and indeed Mr. Heron, when asked was the rule to be confined to Roman Catholic clergymen, and, if extended to clergymen of other denominations, where he would draw the line, answered that he would confine the rule to clergymen having the cure of souls, whom he defined as Roman Catholic priests and clergymen of the late Established Church. Such a distinction is merely arbitrary, and if the privilege existed at all, it should be extended to all clergymen of every denomination who preached sermons, or indeed to laymen, many of whom also preach sermons. We cannot adopt the analogy of the privilege of the members of the House of Commons, and of barristers, which has been also pressed upon us. Such a privilege is founded upon other and different principles, and we can find no public benefit in

extending this class of cases to persons preaching a sermon, and naming or plainly pointing at particular persons. The moral duty of the defendant has been much pressed upon us; but it is admitted that the defendant, in denouncing the plaintiff by name, was violating the provisions of one of the decrees of his own church. It is therefore, a solecism in reasoning to say that there was a duty incumbent on the defendant, when in the very speaking of the words he was violating his duty: Apart, however, from any such question, we are of opinion that the plea of privilege cannot be extended to the occasion of delivering or preaching a sermon, and on this ground we must allow the demurrer.

LAWSON, J. I never thought this case arguable, and feel some surprise that in the year 1877, for the first time, such a privilege should be claimed, which would not be tolerated in these countries even at a period when ecclesiastics were hardly subject to the laws of the land. I am of opinion that neither from pulpit nor altar can slander be uttered, and if it is, the person who does so must justify its truth, or be prepared to take the consequences.

KEOGH, J. I never entertained a doubt about this case from the moment it was mentioned.

Demurrer allowed.

FLOTSAM AND JETSAM.

OFFICIAL REPORTS IN IRELAND.—Complaints have been made, from time to time, in many parts of this country, of the manner in which official reporters do their work. The profession have oftentimes, with good reason, blamed these gentlemen for a lack of promptness in issuing their volumes, or because they publish too much useless matter, or because cases were carelessly prepared, but there has, except in one or two instances, never been a claim made that the decisions given were erroneously reported. And in all our criticisms we have, with a remarkable unanimity, pointed to the experiments which have been made in Great Britain as a sure means of getting rid of such evils as we labour under from improper official or unofficial reporting. It seems, however, that the "Council of Law Reporting" has not, in Ireland, at least, done away with all that is to be condemned in law reports, and if it has proved a cure for what was wrong before, it has introduced other evils of as bad or even a worse character than any we endure. For this statement we have the authority of the Lord Justice of Appeal, who took the pains to give the *Irish Reports* a broadside, in delivering judgment on the 17th July, in the case of *Mackey* v. *Scottish Widow's Fund & L. Assur. Co.* He said: "The last place in the world from which I would advise counsel to think of procuring a correct report, is in the pages of the present *Irish Reports*. I take this opportunity of informing the members of the practising bar that I shall regard it a favour if they throw wholly aside anything which, at any time hereafter, or which since the last May number has been or shall be attributed to me in that publication, whether in this case or any other, I now, by anticipation, disown and repudiate as spurious and unauthorised" The Lord Justice sets forth at length, and with examples, his reasons for this language, which are in substance that, in the publication named, the statements of decisions are not accurate; that the selection of cases is bad, and the head-notes are not well made. The London *Times'* Dublin correspondent says that the "Council of Law Reporting" has held a special meeting to consider the observations made by the Lord Justice, and resolved to publish a statement in reply, &c. The *Irish Law Times* says of the quarrel that, while it sides with the *Irish Reports* and deprecates the personalities in which the Lord Justice indulges, it must admit that there is one grave charge which he makes, which, "if well-founded and incapable of explanation, would go far to justify the severest strictures.'

We have no interest in the quarrel, but the remarks of the Lord Justice have probably much truth, and confirm us in a belief which we have often expressed—namely, that the "Council of Law Reporting" has not proved to be a success even in England. What was promised by the originators of this plan, as we have understood them, was this; That the work of reporting would be well, throughly, and promptly done, so that there would be no chance or reason for unofficial volumes. There are now in existence, however, three or more series of outside reports, one of which is, in our judgment, much better done in every way than is the official one, as it certainly is more promptly done. In Ireland the *Irish Law Times* has published reported decisions, under the name of the *Irish Law Times Reports*, and this publication, so far as value in this country is concerned, is much better than the regular official reports, though we would not go as far as the Lord Justice did and say that these latter reports are a "parcel of trash, a wanton waste of ink, paper and printing."—*Albany Law Journal.*

THE LATE LORD JUSTICE MELLISH.—The loss sustained by the country in the death of Lord Justice Mellish can scarcely be exaggerated.

He was the very type of man that is wanted in the Court of Appeal. In him were combined the highest judicial qualities required for the due and proper consideration and decision of cases on which the judgment of a Court has already been rendered. He lacked some of the qualities essential to a judge 'of all work." He lacked none of those which are expected or desired in an appellate judge. He displayed his wisdom alike in declining to be a judge of first instance, and in accepting a seat by the side of his illustrious friend and colleague, Lord Justice James.

Only seven years have elapsed since Mr. Mellish became Lord Justice, and, therefore, his career at the bar is fresh in the recollection of lawyers. Most of us can remember the dexterity with which he instructed the mind of the Court in Banco; how his acute and subtle intellect seized the point of the case, and presented it in the manner most favorable to his client; how he would take the statute book in his hand, and turn the doubtful section this way and that way, exhibiting the various meanings of which it was capable, and proving that his construction was the only possible one which the Court could safely adopt. So also would he deal with the ascertained facts in a special case, casting a flood of legal light on them, and fixing the eyes of the bench on the side which he desired to present. Yet with all this subtlety of brain, this wonderful dialectic skill, this extravagance of casuistic force, Mr. Mellish was always and above all things fair, honest, and clear, and bright as the sun at noonday. He could play the forensic game against any man; but he played it always like a man and a gentleman.

Added to this intellectual strength, displayed alike at the bar and on the bench, was an array of moral qualities, calculated not only to adorn and beautify his professional career, but also to lend lustre to the man himself. The balance of his mind was ever held in equal poise; he was altogether free from selfish pride, from conceit, from weak passion. In his relations with his rivals at the bar, and with those who had to address him as judge, he preserved the same equable, unruffled temper, the same courtesy, the same tranquil and easy manner. When we consider the infirmity of his physical frame, the torture under which he labored from a lifelong disease, we can only wonder that his unconquerable will subdued every force antagonistic to the full play of his great moral and intellectual powers. To him death was rather a release from suffering than an end of worldly happiness. For the bench, the profession, and the public the same death leaves a void, which we can hardly hope to see filled in our day.—*English Law Journal.*

The death of Brigham Young, it is said, will give occasion to a vast amount of litigation. Not to speak of the difficulties liable to arise out of the peculiar relationship existing between the decedent and the women and their offspring who are called his wives and children, the tenure under which he held a large share of the real estate of which he died possessed, cannot be determined except by an appeal to the tribunals of justice. As the head of the Mormon church, he acquired a large amount of property, which he held in a sort of trust for that organization. It is said that the law in force in Utah does not recognize such an individual as the head of the church, but that the ownership of lands follows the title. It is said that the heirs of the deceased prophet will insist upon the strict construction of the law in this matter, but there may arise a question as to heirship which may puzzle the courts. There is one thing, however, which is certain to result, and that is, business for the Utah lawyers, who, if they cultivate this field well, need not continue the business of vending divorces for use in other States and territories.—*Albany Law Journal.*

The Middlesex Registry in England.—Previously to the closing for the holidays on Saturday, May 19th, and on the re-opening on the 28th, the accommodation was so deficient that a solicitor might have had to wait the best part of an hour before reaching the desk of the overworked clerk who attended to the crowd of applicants. On Monday week the string of solicitors and clerks, every one of whom was either in charge of, or expecting the return of, valuable title-deeds, reached into the street. The attendant clerks are certainly all that could be wished for in the way not only of assiduity, but politeness. But they are egregiously and shamefully overworked. Within the memory of even junior members of the profession two of the principals have broken down. As to the search, it is in many cases a farce. No prudent mortgagor or assignee advances or pays money for or upon the security of leasehold property without a manual transfer of the deeds, or a good reason for their non-delivery. Here is another point. By the last section of the Act, "no Member of Parliament shall be capable of being registrar. . . . or take any fee or other profit whatsoever. . . . out of the said office, or in respect thereof." Who are the registrars? All the certificates of registry are signed by some one as "Dep. Reg." It is said that the enormous funds derived from this overworked and undermaned office are now the monopoly of a partnership of two sinecurists. Who are they? Surely this is a matter on which some active member of Parliament might well bestir himself.—*Pictorial World.*

DIARY FOR OCTOBER.

1. Mon ..County Court Term begins. County Court sitt. (ex York) for trials without jury.
4. Thur..Topmost stone University of Toronto laid, '53.
6. Sat....County Court Term ends.
7. SUN..19*th Sunday after Trinity.*
8. Mon ..Chicago destroyed by fire, 1871.
13. Sat....Battle of Queenston Heights-Brock killed, '12.
14. SUN..20*th Sunday after Trinity.*
21. SUN..21*st Sunday after Trinity.*
23. Tues..Lord Monck arrived at Quebec, 1861.
24. Wed ..Sir J. H. Craig, Governor-General, 1807.
25. Thur..Battle of Balaclava.
28. SUN..22*nd Sunday after Trinity.*

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THE
Canada Law Journal.

Toronto, October, 1877.

The failing health of the Chief Justice of the Court of Appeal for Ontario has been a source of extreme regret to his numerous personal friends, as well as to profession who justly look upon the Hon. W. H. Draper as the most brilliant lawyer who ever adorned the Canadian Bench. His illness has been of a most painful character, but he has borne his sufferings, which we deeply grieve to fear that nought but death can end, with Christian fortitude, and with a power of endurance and self-control peculiarly his own. May a kind Providence "make all his bed in his sickness."

Her Majesty has been pleased to confer upon the Chief Justice of the Supreme Court of Canada the honor of Knighthood. If any one man more than another in this country, has raised himself to the highest position in the land by dint of his own unaided industry, integrity and ability, that man is Sir William Buell Richards. None will be found to say a word against so deserved an honor, and all will be pleased to know that the services of the Chief Justice have been appreciated. Although somewhat brusque in manner, his kind, large heart endeared him to all, whilst his solid learning, practical common sense, great breath of thought and force of character, long since marked him as a man eminently fitted for the high office he now fills. We trust he may long live to enjoy the honor conferred upon him.

Our correspondent, E. D. A., continues in this number to discuss some important points relating to the law of dower. His letters have been read with interest, and

we are glad to publish another. We expressed a hope some time since that some one might write a book on the law of dower. We think it might fall into worse hands than those of our industrious and intelligent correspondent.

The Chancellor recently took occasion to call attention to the fact that it was customary for the press to suppress in their reports the names of attorneys and solicitors against whom proceedings were instituted. He thought that the practice—though it arose from a kind and courteous motive—so far from being any benefit to the profession, had the effect of concealing from public disgrace the small number of the profession who were guilty of acting dishonorably, thereby identifying the comparatively large portion, who in discharging their duties had a due regard for the dignity of the profession with the objectionable minority. We concur in this view of the matter, subject however, to this proviso, that motions for rules nisi, or other preliminary motions, if published at all, should not give the name, but that when rules absolute and orders are made, the proceedings should be reported with all necessary particulars as in ordinary cases.

Lord Justice Christian is an Ishmaelite indeed. Lately he has been falling foul of the Council of Law Reporting in Ireland, and gave notice to the Bar that everything which would be thereafter attributed to him in the pages of the Irish reports, he, by anticipation, disowned and repudiated as spurious and unauthorized. This reminds one of the story told of the judicious Mr. Price, and the Court of Exchequer, at the time it was a close Court. When he began reporting there, one learned baron was heard to ask of a brother—"What does that fellow come here —taking down what we say—for?" In the long run it has been found advisable for the Judges and the "noble army of reporters" to work in harmony and not at cross-purposes. Moreover, the Lord Justice in writing to the *Times*, making strictures on the observations of the Law Lords who ventured to reverse one of his judgments, is shewing a sort of perverse pluck, much more to be deprecated than commended. It is certainly an unseemly and ill-advised course for the over-ruled Judge of an inferior tribunal to endeavour to set himself right by means of the newspapers. The professional public, to whom he appeals, can well guage the merits and demerits of occupants of the bench, without the necessity of judges descending into the arena of personal controversy.

RECENTS DECISIONS AND THE CURRENT REPORTS.

We venture to think that one point decided in *Hutchinson* v. *Beatty*, 40 U. C. R., 135, has hardly received sufficient consideration. There was a sale of timber by the locatee, and it was stipulated that ten years should be allowed for taking it off. The sale was in 1873, so that the limit of time for the removal had not been reached, and it was really not necessary to decide upon the effect of the time-limit. But the Court did so, and held apparently that the limitation was bad, as the statute did not provide for the forfeiture of the timber in default of removal within a given time. It was said to be impossible, in the absence of express legislation, to decide that the standing timber sold on free grant lands should be removed in one, two, three, or any other given number of years. But, surely, the true view is that the statute has nothing to do with this term of the bargain. The statute gives the right to sell the trees; the manner of sale and the quantity sold depend upon

the agreement between the parties. A sale of timber to be removed in ten years may mean a sale of so much of the timber as is removed within that time, and what is not so removed is to be considered as not sold.

The head note in *Haldan* v. *Beatty*, 40 U. C. R., 110, is scarcely perfect. It might, we think, be amended by a slight change, thus: The executor of one W., having paid money to defendant as a legatee under the will, and the will with the probate having been afterwards set aside by the Court of Chancery, the plaintiff, as administrator, was held entitled to recover the money from the legatee (or, *semble*, from the executor).

One objection to the conviction decided in *Regina* v. *Cavanagh*, 27 C. P. 537, is contrary to an earlier decision of the same Court, not cited in the later case. In *Regina* v. *Strachan*, 20 C.P., 182, it was held that in a conviction for selling liquor without a license, it was not necessary to state the name of the person to whom the liquor was sold. In *Regina* v. *Cavanagh*, the Court thought that the omission of the name would have been a fatal objection, but that it was remedied by certain statutes referred to. Upon examination of the cases it will be seen that the two holdings are irreconcileable.

It is rather dangerous for a reporter to state in a head note that a certain other case has been over-ruled, but we think the head-note of the report of *Wiley* v. *Smith*, 1 App. R., 179, should have mentioned that the cases of *Graham v. Smith*, 27 C. P., 1, and *Howell* v. *Alport*, 12 C. P., 375, were thereby over-ruled. Cases questioned or dissented from are properly mentioned by the English reporters: *a fortiori* should attention be called to cases that are extinguished as authorities.

In *Harris* v. *Smith*, 40 U. C. R., 52, the Chief Justice of Appeal adverts to the language of the plea as justly bringing it within the old rule, "the plea of every man shall be construed strongly against him that pleads to it, for every man is presumed to make the best of his own case." Of late very serious innovations have been made upon this canon of pleading both at common law and in equity. In *Workman* v. *The Royal Insurance Company*, 16 Gr., 190, it is said that when the Court sees from the whole of the allegations that the pleader must have meant his language in a sense not against him, it shall not be taken in a sense against him. Thus the ambiguity is removed by what is seen to be the scope and intent of the pleader. This is perhaps the case alluded to by the present Chancellor in *Grant* v. *Eddy*, 21 Gr., 573, where he repeats the same views. In this latter case Blake, V. C., lays down three rules of construction which clearly mark the great modification the old maxim of pleading has undergone since the abolition of special demurrers.

Very much akin to this is the gradual disintegration of the ancient cognate maxim as to construing a deed most strongly against the grantor. Upon this change, the Master of the Rolls has observed with his usual felicity in *Taylor* v. *The Corporation of St. Helens*, 25 W. R., 887, "I will take the liberty of making an observation as regards a maxim to be found in a great many text works, and I am afraid also in a great many judgments of ancient date, and that is that a grant, if there is any difficulty or obscurity as to its meaning, is to be read most strongly against the grantor. I do not see how, according to the new established rules of construction as now settled by the House of Lords, that maxim has any particular or special application at the present day. The rule is to find out the meaning of the instrument, using the ordinary and proper means of construction. If you find out its meaning you do not want the maxim, because you have already done so without any

such maxim. If, on the other hand, you cannot do so, then the instrument is void for uncertainty, and in that way you certainly construe it in favour of the grantor, because you annul the grant. Beyond that it appears to me it is impossible that the maxim can have any practical application."

Passing from details to generals, one crying evil of all the reports is their length. In nearly every number issued may be found cases which are either mere repetitions of former decisions, or lengthy findings on disputed facts, or collations of decided law, out of place in volumes which should embody only, but all, cases elucidating the development and progress of judicial decisions. When one of the Common Law reports was presented by the Parliamentary committee to the Duke of Wellington, his only remark is said to have been: "Too much of it,—too much of it,—a d—d deal too much of it." What with the increasing number of volumes from the different Courts and the increasing length of judgments in the individual cases, one is reminded of Professor de Morgan's whimsical objurgations on the German language as he enumerated the seven deadly sins of excess therein (1) too many volumes in the language; (2) too many sentences in a volume; (3) too many words in a sentence; (4) too many syllables in a word; (5) too many letters in a syllable; (6) too many strokes in a letter, and (7) too much black in a stroke. Let the reporters discharge their functions of condensation—excise, suppress, curtail — remembering that as brevity is to wit, so is succinctness to reporting.

MIND AND MUSCLE.

We are glad to notice the recent formation of a new company in the "Queen's Own Rifles" from among the Law Students in Toronto, hereafter to be known in that regiment as No. 7.

Volunteering is very popular just now. Perhaps this is somewhat due to the fact that the establishment of a standing army in Canada is becoming a debated question. Recent events in this Province, and events still more recent and startling in the United States, have given the proposition a tangible shape. It is not our province, however, to discuss the advisability of having a standing army in Canada; nor are we prepared, at present, to assert that the organization of this branch of the "Devil's own" will be a sufficient defence against any impertinence from even the limited army of our cousins to the south of us, but we are satisfied that they will charge the enemy abroad as bravely as they do their clients at home (and this speaks volumes for some of them). But, joking apart, perilous times may come, as they have before, to this Canada of ours, and then, as was seen years ago, we may also see future Chief Justices leading their companies to victory, or marching in the ranks as full privates, shoulder to shoulder with those whose profession is emblematic of force and violence. "There were giants in those days," but who knows but that the new corps may now, or hereafter, have on its roll men whose records will not be unworthy of the names of Robinson, Macaulay or McLean, and who may obtain discharges as honorable as did they. Student soldiers, whose graves are yet green, have shewn that they can fight as bravely and bleed as willingly for their country as did their forefathers. But in these days more is required than mere individual bravery or soldierly fortitude, war has become a great science, and even in its higher branches we can claim a representative from Osgoode Hall. A barrister and a Canadian volunteer has done honor to himself and to his country by his book on Cavalry, this work having been selected by the the Russian Government as the best of many at a competition open to the world,

perhaps, also, it is even more than a coincidence that the tactics employed by the German cavalry in their late war were identical with those urged by Col. Denison in a book on that subject just then previously published.

Volunteering, however, as well as many other out door pastimes has also its practical everyday aspect, one very important for lawyers and students to consider. No class of persons are at the same time so averse to, and so benefitted by, exercise. A walk down to the office, a rush to the Hall, and a walk home again, is what most of them call exercise. It never occurs to these unfortunates that a walk with the brain revolving some legal problem, or some knotty case, is practically useless as a life-giving exercise. We know how few have, or think they have, time for aught else, no wonder then that many a student finds himself on his "beam ends" before he has been studying for two years. Volunteering is, of course, not the only exercise attainable—many will prefer rowing, (and a member of the profession has done much to make this excellent recreation both popular and easy of attainment in Toronto) yachting, cricket, etc., and some few "knowing ones" make it part of their day's work to spend half an hour at the gymnasium, in the winter; but it cannot be denied that the drilling, the "manual" and the "bayonet" exercise, all call the muscles into play in a much needed way, while the effect of the companionship and sense of novelty, togethe with the excitement of rifle practice, is most beneficial to those who so sedulously subordinate their imagination to their reason.

No little credit is due to Capt. Bowes and Lieut. Hodgins, and others, for their energy in starting the corps. Something similar was attempted some years ago, but the scheme then fell through.

In connection with this matter we are glad to see that the Osgoode Hall athletic sports have been continued this year resulting in a very successful meeting.

LAW SOCIETY.

Trinity Term, 41 Vict.

The following is the *resumè* of the proceedings of the Benchers during this term, published by authority :—

Monday, August 27, 1877.

The minutes of last meeting were read.

The report of the examiners on the examination of candidates for Call was laid before Convocation and approved.

The gentlemen whose names appear in the usual list in this Journal, were ordered to be called, and on presenting themselves were called to the Bar.

A representation, dated 31st January, 1877, from A. Shaw, Esq., and others of Walkerton, to the Secretary, was read.

Ordered, that the Secretary reply to the same, as instructed by Convocation.

The several petitions of Richard Willis Jameson, and Isidore F. Hellmuth, setting forth that they had been called to the Bar by the Honorable Society of the Inner Temple, and praying that they might be called to the degree of Barrister-at-Law by this Society, were read.

Ordered, That they be called to the Bar.

The said Richard Willis Jameson, and Isidore F. Hellmuth, thereupon presented themselves and were called to the Bar accordingly.

The report of the examiners on the examinations of the candidates for admission as Attorney's, was received, read and approved.

The report of the Secretary upon the articles, affidavits, and certificates of service of the various candidates was received.

Ordered, That certificates of fitness be granted to D. B. McTavish, J. A. McGillivray, H. A. Marsh, P. C. McNee, L. K. Murton, D. McMillan, D. Steele,

T. W. Howard, E. McMillan, J. H. Hegler, J. W. Hector.

Also, that a certificate of fitness be granted to C. W. Peterson, after 2nd September, 1877, on his producing certificates and proof of his having completed his term of service. Also, that the several petitions for certificates of fitness of L. D. Teeple, W. S. Gordon, C. S. Wallis, J. McSweyn, C. McDonald, R. Shaw, J. Woodman, J. Crowther, and H. M. East, who have passed their final examinations for admission as Attorneys, be referred to the committee on Legal Education for consideration and report.

The report of the examiners on the Intermediate Examinations was laid before Convocation, read and approved.

The report of the Committee on Legal Education on the Primary Examinations was received and read.

The petition of Alexander McBeth Sutherland, was laid before Convocation with his degree of B. A. in the University of Toronto.

Ordered, That he be admitted as a Student-at-Law.

The petition of Mr. Albert Hamilton Backhouse was referred to the committee on Legal Education for consideration and report.

A letter dated 9th Jan., 1877, from Mr. Kenneth Goodman was read, stating that Mr. T. J. Wilson, who had paid his fees for his certificates on the 9th of December last, as stated by the Secretary, died on the 18th of the same month.

Ordered, that the sum of $20, amount of fees paid by Mr. Wilson, be returned to Mrs. Wilson on a statutory declaration being furnished to the Secretary establishing Mr. Wilson's death as having occurred at the date mentioned, and setting forth the name of his widow.

The resolution of Mr. Hodgins respecting a standing committee on discipline (read a first and second time during last term) was read a third time and passed.

Ordered, that Mr. McLennan, Mr. Hodgins, Mr. Benson, Mr. Hoskin, Dr. McMichael, Mr. Robertson and Mr. Osler, be the standing committee on discipline until Easter Term next.

Ordered, That Mr. McCarthy's notice of motion, to rescind the standing orders passed under 39 Vic., Cap. 31, and to substitute orders in place thereof, and Mr. Hodgins' notice of resolution relative to an Executive Committee of Convocation, do stand to first Monday of next Term.

Ordered, That Mr. Evans be paid the sum of one hundred dollars for his services as examiner for the present Term, and that he be appointed examiner for the next Term.

Tuesday, August 28.

The minutes of the proceedings of yesterday were read.

The balance sheet for the second quarter of 1877, was laid before Convocation.

The report of the committee on Legal Education, reporting the names of the several applicants for the position of Lecturer and Examiner, was read.

Ordered, That the Secretary do give notice by circular, of the intention to appoint a Lecturer and Examiner on Common and Commercial Law, and also a President of the Law School as required by Rule 104, for second Friday of present term.

The report of the committee on Legal Education on the several petitions referred to them yesterday was laid before Convocation, reporting in favor of certificates of fitness being granted to Messrs. Gordon, Wallis, McSweyn, Shaw, Crowther, and Teeple.

Ordered, that the report be adopted except as to the petition of Mr. McDonald, which is to stand for further consideration.

Ordered, that Mr. Alexander Leith be appointed Bencher in the place and stead

of Kenneth McKenzie, Esq., Q. C., resigned.

Moved by Mr. Martin, seconded by Mr. McCarthy, That Messrs. McCarthy, Crickmore, Bethune, Hector Cameron, Patton, Martin, McKelcan, and Maclennan, be a special committee to consider and report upon the resolution which was moved by Mr. Crickmore and seconded by Mr. Read at the meeting of Convocation held on the 25th Nov. last, and that the subject of the Law School, generally, be also referred to the same committee, and that said committee report on the first day of the next Term. Carried.

September 7.

In the absence of the Treasurer, Mr. Read was elected chairman.

The report of the Committee on Legal Education on the petition of H. M. East, was read and adopted.

Ordered, That Mr. East receive his certificate of fitness.

The petition of Mr. Richard Willis Jameson, was referred to the Legal Education Committee.

The petitions of Messrs. McNab and McCutcheon, asking that they might be exempted from paying arrears of Term fees, were refused.

Mr. Kirkpatrick's certificate was ordered to be issued to him without fine.

Mr. R. W. Adams' certificates for 1876 and 1877 were ordered to be issued without fine.

The report of the Legal Education Committee on Mr. McDonald's case was adopted.

The report of the committee on discipline, in the respective cases of two barristers, was read and adopted, and the barristers named were called upon to make explanations.

Ordered, That all letters referring to annual certificates be referred to the Finance Committee.

The Treasurer took the chair.

Moved by Mr. Hodgins, seconded by Mr. Robertson, and resolved, that the appointment of Lecturer and Examiner and of President of the Law School, be postponed until the first Tuesday of next Term.

Ordered, That the names of Mr. Leith and Mr. Hodgins, be added to the committee appointed on 28th August last to consider and report upon the resolution therein mentioned, and the subject of the Law School generally.

SELECTIONS.

EASEMENTS AND APPURTENANCES.

The easement clause in a deed, although a mere common form, is a most important part of the conveyance, the omission of which any good conveyancer would regard as a careless mistake. By omitting the easement clause in an original grant or lease, it would be held that, in the absence of special circumstances, the easements and appurtenances would not pass. But in conveyances other than original grants or leases, if the easements and appurtenances were conveyed expressly in the original grants or leases, and reference were made to such original grants in the subsidiary ones, the easements will pass by implication. In the case of *Renwick* v. *Daly*, 11 Ir. L. T. R. 96, decided by the Court of Common Pleas in Ireland last Trinity Term, J. M. demised for a term of years to P. T. certain premises, together with *inter alia* "the right to use the walls on the north side of the said plot for building purposes." Subsequently, P. T. sub-demised to the defendant these same premises along with others, describing them as "the plot or piece of ground on the north side thereof, lately purchased by the said P. T.," setting them out by metes and bounds: "To have and hold the said demised premises with the rights, members, and appurtenances thereunto belonging or in any wise appertaining." The granting party of the lease did not expressly mention the right to use the wall, nor did it mention the easements and appurtenances. In an action of trespass *q. c. fr.*, brought by the assignee of J. M., the landlord, to try the right of the defendant to use

the wall for building purposes, the Court held that the right to use the wall for that purpose passed under the above sub-lease, irrespective of the habendum; that the plot of ground originally leased by J. M. to P. T. was specifically stamped and impressed with the right to use the wall in controversey, and that what was conveyed to the defendant was the plot of ground so stamped and impressed.

But it frequently happens, especially in cases of tenancies from year to year, that lands are let without any writing whatever. What then becomes of the easements? It appears that in Great Britain and Ireland, notwithstanding some conflict of authorities, those easements which are usually enjoyed with, and are essential to the convenient occupation of lands, will pass by a parol demise when, at the time of the demise, the easements existed and were in use. The principle upon which this rule proceeds is that, when a person grants a house or land, he impliedly grants everything that is indispensable for the full enjoyment of the subject-matter of such grant. This principle has been exemplified in several cases which, though not cases of parol demises, are similiar to them. In the familiar case of *Pyer* v. *Carter*, 1 H. & N. 916, the owner of two adjoining houses sold and conveyed one of them to a purchaser, and it was held that the house so sold was entitled to the benefit, and was subject to the burden, of all existing drains communicating with the other house, although there was no express grant or reservation for that purpose. In *Ewart* v. *Cochrane*, 4 Macqueen 122, the respondents, who were the owners of a tan-yard, were held to be entitled to use a conduit leading to a cesspool on the appellant's property, without an express grant of such right. Lord Campbell, L.C., in giving judgment, said:—"I consider the law of Scotland, as well as the law of England, to be that when two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used and was necessary for the comfortable enjoyment of that part of the property which is granted, shall be considered to follow from the grant, if there are the usual words in the conveyance. I do not know whether the usual words are essentially necessary, but where there are the usual words I cannot doubt that that is the law." He afterwards added—"When I say it was necessary I do not mean that it was so essentially necessary that the property could have no value whatever without this easement, but I mean that it was necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant." And in *Watts* v. *Kelson*, L. R. 6 Ch. 166, it was decided that if the owner of a house and land makes a formed road over the land for the apparent use of the house, and then conveys the house separately from the land with the ordinary general words, a right of way over the road will pass. The above principle was recently extended to the case of a parol demise by the Court of Common Pleas in Ireland in *Clancy* v. *Byrne*, 11 Ir. L. T. R. 94. The action was for disturbance of a right of way. It was proved at the trial that the plaintiff held two pieces of land under two landlords—one portion as tenant from year to year under G., and the other as tenant for lives or years under A. There was an accomodation pass from the plaintiff's house to the high road over part of the defendant's land. It was for some distance a well-defined carway as far as a certain kiln, and from the kiln to the defendant's house the way was undefined, but from his house to the high road it was a well-defined carway. In 1857 the plaintiff's father obtained a lease from A. for three lives or thirty-one years of adjoining land, called M., through which there was a way to the high road, and the distance from the plaintiff's house through these lands to the high road was shorter than the way in dispute, but portion of this way was over swampy ground, and was difficult to use. The defendant had been in possession for two years as tenant from year to year under G., prior to which time he was in possession as caretaker for G. of the lands. It was proved by the plaintiff that the user of the way with horses and carts had been enjoyed by the plaintiff, his father, and grand-father for over sixty years; and the jury found for the plaintiff, that he had used the way as of right. The Court refused to set aside the verdict, upon the ground that, if at the time the landlord let the farm this means of access to the high road existed, and if the landlord demised the farm with the appurtenances and the easements, the way would pass, and that, too, although

it was not strictly a legal way of necessity, but a way the use of which was essential to the convenient enjoyment of the farm. The evidence in the case was sufficient to show that it had been so demised.

It would appear that the Courts in America are somewhat less liberal in deciding what is necessary for the comfortable enjoyment of premises. In the case of *O'Rorke* v. *Smith*, the Supreme Court of Rhode Island laid down a some what stricter rule. M. C., the owner of a tract of land, conveyed the west portion to D., reserving to himself the use of a well thereupon for the benefit of the remaining part, which he called the homestead estate. M. C. devised to J. in fee the land between the house and the lot sold to D.,; and to S· the house and the rest of the homestead estate. For a considerable period, but not for long enough to gain an easement by prescription, the occupants of the house had crossed the land devised to J. to get to the well. The only other way for the parties residing in the house to go to the well was by going down the street in front of the house and accross D.'s land, but this was longer, and it was not known that D. would consent to it. In trespass *q. c. fr.* by the grantee of J. against S., it was held that the way across J.'s lot could not be claimed as a right of way of strict necessity, and that the right of way could not be implied from the circumstances of the case as one reasonably necessary. Durfee, C. J., in giving judgment, drew a distinction, supported by some English authorities, between continuous easements, such as air, light, &c., and non-continuous easements, such as rights of way ; and decided, with regard to the latter, that the party claiming the easements would be required to show, either that without the use of the way he would be subjected to what, considering the value of the granted estate, would be an excessive expense, or that there was a manifest and designed dependence of the granted estate upon the use of the way for its appropriate enjoyment, or to adduce some other indication equally conclusive. A similiar conclusion was come to by the Court of Appeal at Ontario,* Canada, in the case of *Harris* v. *Smith*, (*ante*, *infra*. 128) where the Court held that a shop and premises demised by a deed *with all the appurtenances* would not give the lessee a right of way over a neighbouring close, although both premises had originally belonged to the same landlord, and although the close had been demised subject to the right of way. The decision was grounded upon the same reasoning, namely, that a right of way is not such a continuous easement as to pass by implication of law with a grant of land ; only a way of necessity will so pass. The American and Canadian Courts thus considered that, in the absence of express words of grant conveying the easement, it is necessary to prove an absolute necessity—*i.e.*, no other mode of access to the object sought to be approached. It may be added that New Jersey, Louisiana, and Illinois are the only States of America which have adopted the English common law rule as to easements in light and air being capable of acquisition by use or prescription : see *Stein* v. *Hauck*, 4 Cent. L. J. 581. The tenant-farmers in Ireland may be thankful that the courts of law and equity at home are more liberal in their views on the doctrine of easements than the courts on the other side of the Atlantic.—*Irish Law Times.*

* This writer has followed the example of an Englishman in speaking of Ontario as if it were a city. They know many things at home, but are lamentably ignorant of geography. We would mention for their information that Ontario is the name of a country about twice as large as the United Kingdom.—Eds. L. J.

HOW TO GET MARRIED.

This is the question which at the present time is agitating the minds of millions of the fairest daughters of our land. Alas ! for these bright maidens, States now-a-days neither give bounties to men who marry young, nor impose heavy penalties upon all celibates, as the Grande Monarque was wont to do in Canada. 1 Parkman's Old Regimé, 225. This is a query apparently scarcely more soluble than the Oriental question in Europe or the Celestial question in America, yet we will endeavour to answer it, and if our efforts throw any single beam of light into minds darkened by the shades of uncertainty or doubt, we will feel that we have not dipped our pen in ink in vain.

Dear readers, do not expect to have in these lines receipts for philtres to bring back to your sides erring lovers, or draw

thither new admirers, nor mysterious secrets of occult sciences, by which chill December may win sunny May, *or vice-versa*; do not hope to read herein how bride or bridegroom, best-man or bridesmaids. should be attired on the momentous occasion when the bonds of wedlock are being fast riveted by priest or parson, justice or deacon; think not to be intertained by the "how" among the foreign nations in the dark places of the earth. Such lofty themes transcend our humble powers; we only propose to try and show how the two distinct entities are welded together into one person, in the eye of the law and to the satisfaction of the lawyers.

Start not as if pierced by some serpent's tooth, at the sight of these two words, "law" and "lawyers," for "the law is, after all, the most romantic of professions." Happily for its members it is not entirely composed of sheep-skins and dust and decided cases, "quiddets and quillets, cases and tenares," as the Prince of Denmark hath it. "Many are its paths of pleasantness, and writers of fiction, seeking where they can find what most will interest their readers, have oft-times turned to the law and invoked its invaluable assistance without compensation in compounding a plot or inventing a striking episode."

Take, for an example (which touches the point under consideration), a novel, which many of you have read during this very season, "What he cost her" (a truly novel subject, for most books might be truly said to be on what she cost him), by Mr. James Payne. The most exciting part of this highly creditable story is where the hero, Landon by name, is in the prisoner's docket to be tried for bigamy—he having deemed his first nuptials void, because his lady-love had married him under an assumed name, had taken to himself another partner for better or for worse. During the opening address of the counsel for the crown (for the trial took place in "merrie old England"), what puzzled Landon was, that the fact of his having been ignorant of the deception in the matter of the name (on which he counted for sympathy), was willingly conceded by the learned speaker; afterward he found that this was the chief point relied upon by his enemies. You, fair friend, did not see any great importance in the examination of Ella by Mr. Pawson, after she had explained that, owing to a quarrel with her father years before, she had taken and ever since been called by her mother's name. He asked:

"There was no material cause, then, why you should have deceived your husband?"

"None whatever," she replied.

"He did not, however, aid or abet you in the deception?"

"He? no!"

"I mean," continued Mr. P., "that you and your husband did not agree together before marriage to deceive the public by your assumption of this false name?"

"Most certainly we did not," answered the fair witness.

You doubtless found these questions and answers far from startling, in fact, monstrous; but the wicked hero, perched on the ragged edge of despair, noticed that they had a marked effect on the gentlemen in horse-hair wigs; he saw stuffs and silks look at each other significantly, and the Judge himself steal a glance at him over his spectacles—a look which seemed to chill him to the very marrow. Ella, too, felt that her replies had sealed the doom of her once dearly-beloved. And well-grounded was the fear of the culprit, the triumph of the accusers. Sufficient cause had the lawyers for the glances which said unmistakably, "he's a goner;" and very bad on the bench for that look which read "you rascal, fifteen years of penal service for you." For the law of the land at that time said that a marriage not lawfully celebrated, by reason of fraud having been practised by one party or the other, was valid in favor of the innocent victim, and that a marriage was perfectly good even when one of the parties had been married under a false name, providing the other was not cognizant of the deceit: *Kiny* v. *Wroxton*, 4 B. & A. 640. Hence, Ella having proved her husband ignorant of her real name, established the validity of the marriage, branded him as a bigamist, and severed the last hair that held the sword of Justice pendant over his head, consigning him to ignominy, disgrace and servitude. Having done all this, you remember she determines, woman-like, to rescue him ere the punishment, so richly deserved, overtakes him. She conspires with his counsel; produces a statement written by herself before her wedding, for Landon's perusal, explaining

all about the change of name, and on cross-examination, has an attack of *nommi-ricardo*, and will not swear that the wretch at the bar had not read the paper on their marriage eve. On this peg is hung the argument that both Eva and Landon had conspired to deceive the public, and had knowingly and wilfully intermarried without due publication of bans and proper license, and consequently the marriage was void. She was not Mrs. L., and Mr. L. had been free to wed when he met his second love.

Strange this may seem, but the law was good, provided the marriage took place after the fourth year of the reign of his majesty George the fourth. If the wedding had been before that time it would have been different, in the event of Langdon's ignorance, as Miss Mary Hodgkinson, who was married under the name of White, without any intention to mislead or without misleading any one interested, found to her cost, when her union was declared invalid: *Rex* v. *Tibshelf*, 1 B. & A. 195.

It may be a comfort to some in this world of trouble to know that the employment of a sham clergyman or forged license will not render the service inoperative when the innocent victim desires the noose to hold tight: *Dormer* v. *Williams*, 1 Curt. 870; *Lane* v. *Goodwin*, 4 Q. B. 961.

Nothwithstanding the widely-spread belief that matrimonial alliances are made in heaven (which, if true, must cause heaven to be anything but a place of rest, and almost require the presence in those realms of the blest of some individuals that one would think might as well be kept out), among all Anglo-Saxon communities marriage is but a civil contract —like an agreement to build a house or to make a bonnet; and the essence of it consists in the consent freely given by a man and a woman able at the time to agree. Force or coercion used towards either party will invalidate the affair: *Stevenson* v. *Stevenson*, 7 Phil. (Pa.) 386. It would be very unwise, therefore, for any youdg lady to make a dead set upon an eligible *parti*, and intimidate him into matrimony by threatening imprisonment and such like dire inflictions, for, though the lips of the timid and frightened male murmer assent to the all-important "wilt thou?" yet, neither mind nor heart consenting, Justice and Right will rescue the entrapped one, aud put asunder those thus joined together: *Collins* v. *Collins*, 2 Brewst. (Penn.) 575. Mere unwillingness, some degree of reluctance, a show of masculine modesty, a refusal to take the hand of the bride, holding his peace (prehaps his last until he gains the quiet of the tomb), will not, however, enable the bashful swain to reconsider the matter after the justice or parson has performed the ceremony, even though the presence of the parents of the bride and a conservator of the peace in charge of the good man may have somewhat overawed him: *Jackson* v. *Winns*, 7 Wend. 47. And voluntarily taking up housekeeping, or going into board together, after the cause of intimidation has been removed, will have the effect of making perfectly good (so far as the law is concerned) a marriage at first invalid, brought about by fraud or force: *Hamstead* v. *Plaiston*, 49 N. H. 84.

And now let us approach the great question, will a marriage, entered into with the entire concurrence of those deeply interested, be valid and binding if all the rites and ceremonies, religious or otherwise, have been absent? This query touches the pockets of all marriageable and marrying "forked radishes with heads fantastically carved," whose business it is to fee—handsomely or otherwise, as the spirit or the circumstances may move them —the officiating priest or magistrate, Nay, more, it affects the pockets of all interested, for clothes, which Carlyle says give us individuality, distinction, social polity—which have made men and women of us—which are threatening to make clothes-screens or scare-crows of us—cost money especially at such times. On this important point doctors (of the law) differ rather widely. Some writers have said "yea" and others "nay" to the question; while courts and judges have said "ditto" and "do" to either response.

Long since, Parsons—ample authority in such matters, we must recognize in the name—said: "Marriage being essential to the peace and harmony, and to the virtues and improvement of civilized society (comfortable words, surely, to many a lonely heart) it has been, in all well-regulated governments, among the first attentions of civil magistrates to regulate marriage. Where the laws of any State

have prescribed no regulations for the celebration of matrimony, a mutual engagement to inter-marry by parties competent to make such a contract would, in a moral view, be a good marriage, and would inpugn no law of the State. But when the civil government has established regulations for the due celebration of marriage, it is the duty as well as the interest of all citizens to conform to such rules :" *Milford* v. *Worcester*, 7 Mass. 48. Another Parsons (think not, gentle reader, that the expression is ungrammatical) says: "That in all Christian communities of which we have any knowledge, and, as we suppose, in all civilized countries, certain ceremonies are prescribed for the celebration of marriage, either by express law or by a usage which has the force of law, and the question is, whether a mere consent of the parties, even with mutual promises, but without any use of or reference to any of these ceremonies, is sufficient to constitute a valid marriage :" 2 Parsons on Contracts, 75.

Whenever there is a ceremony, no particular form of words and no particular actions or deeds are necessary. A simple nod of the head or bob of a curtesy in response to the fatal query will be as efficacious and as binding upon the nodder or bobber as the most sonorous "I do," or simpering "yes," accompanied by Sir Charles Grandison bows and ritualistic genuflexions: *People* v. *Taylor*, 1 Metc. (N. P.)190.

A gentleman, hailing from Boston, whom we have before quoted, and who claims for himself great knowledge on this and kindred subjects, says he never knew of any case in which a mere agreement to marry, with no formality and no compliance with any law or usage regulating marriage, has actually been permitted to give both parties and their children all the rights and lay them under the obligations and liabilities, civil and criminal, of a legal union: 2 Parsons on Contracts, 79. His next sentence, however is an admission that some recent decisions of the courts seems to tend strongly in the direction which he disapproves. To some of these cases we will refer.

A man and a woman in New York State, were engaged to be married. The former entertained the notion that wedding ceremonies were vanities of vanities, empty show, vain delusions, unnecessary expenses, in fact he did not believe in them, and expressed the desire that his lady-love would fore-go the performance, especially as the marriage without them would, to his mind, be all sufficient. The fair one hesitated—the pomps and vanities of this wicked world and the flesh pots of Egypt had strong hold on her. But at last she gave way to his wishes, and named the day which was to see these twain made one flesh. On that eventful hour they went out riding together in a carriage, and while rolling smoothly along the gent produced a ring, and placing it upon the lady's finger, said: "This is your wedding ring; we are married." She received the circle of gold as the sign of wedlock. He then further remarked: "We are married; I will live with you and take care of you all the days of my life, as my wife." She made no objection to the pleasant programme thus sketched out for her future course, and together they drove to a house where he had previously engaged board for "himself and wife." There they lived together for over a month, he treating her and speaking to her and of her as his wife. Soon—sad to relate—a change came oe'r the spirit of their dreams. We seek not to lay blame at the door of either, but a divorce was sought for, and the Supreme Court of the State held and decided that this simple and uncommon marriage was perfectly valid: *Bissell* v. *Bissell*, 55 Barb. 325.

On the other hand, once upon a time in Scotland, after a family supper, at which, we may assume, toddy was not absent, one of the party, a jolly old batchelor, put a ring on the finger of a daughter of the house, a maiden bright and fair, saying to her, "Maggie, you are my wife before heaven; so help me, oh God!" The two kissed, the lady modestly exclaming, "Oh, Major!" The banqueters then drank the very good health of the happy couple, and forthwith bedded them according to an old Scotch custom. In course of time the question arose, was Maggie the wife of the Major? The Court of Sessions said she was, but the final court of appeal in the kingdom took the liberty of reversing that decision, and saying she was not, upon the ground that it appeared clear to them that no real marriage was then intended, and although the ultimate maturing of matrimony was hoped for and confidently anticipated by

poor Maggie and her friends: *Stewart* v. *Robertson*, 2 H. L. (Sc.) 494.

It seems pretty clear, however, that in the state of New York no religious form or ceremony of any kind, nor, in fact, any formality, except the agreement itself, is essential to the validity of a marriage. Any agreement made in the present tense between persons of the opposite sexes, capable of contracting, whereby they assume toward each other the marital relation, is actually a marriage. It need not be in writing, nor need any witness be present. And it may be proved as any other contract; and when proved to the satisfaction of a court of justice, it constitutes a lawful marriage: *Bissell* v. *Bissell*, *supra*; *Van Tuyl* v. *Van Tuyl*, 8 Abb. N. Y. Pr. (N. S.) 5. The service of both priest and magistrate may be dispensed with: *Wright* v. *Wright*, 48 How. Pr. 1. Out in Mississippi, too, it has been decided that to constitute a legal union nothing more is needed than that, in language which both of the contracting parties understand—be it English, Irish, or Dutch—or in words declaratory of their intention, they accept one another as man and wife, and if the words used do not, in their ordinary meaning or common use, "conclude matrimony," yet if the man and woman intend marriage, and their intent is sufficiently manifest, they become inseparably welded together until, as Samuel Smetes says, ill-cooked joints and ill-boiled potatoes, calling in the aid of a divorce court, put them asunder. Their consent to enter into the holy state may be expressed either in writing or orally: *Dickenson* v. *Brown*, 49 Miss. 357; *Rundle* v. *Pegram*, id. 751.

So, in Pennsylvania, in the present tense, (one sees now, what one prehaps never saw before, the advantage of the study of grammer) uttered for the purpose of effecting a matrimonial alliance, is all that is required. No particular form of solemnization before officials of either Church or State is needed: *Commonwealth* v. *Stamp*, 53 Penn. St. 132. The law among among the dwellers in Alabama is similiar, to all intents and purposes: *Campbell* v. *Gullatt*, 43. Ala. 57. In Michigan, too, if persons agree to take each other for husband and wife, for better, or worse, at once without any pomp or ceremony, or show, that may be pleasing to human nature, and from thenceforth live together, the Gordian knot is fairly tied, only death or some heartless divorcer can cut it: *Hutchins* v. *Kimmell*, 31 Mich. 127.

People who quote Latin, and know a little more of that classic tongue than "e pluribus unum," "excelsior," "sine qua non," "compos mentis," "et cætera," and agree in the correctness of the law, as stated in these last-mentioned cases, express the principle enunciated in them, with the aid of their little Latinity, as follows: Marriages made *per verba de presenti, vel per verba de futuro, cum copula*, are lawful. And this being interpreted means, that a marriage contract entered into by words signifying the intention of having a wedding then and there, and the couple immediately separating, and one entered into by words expressive of a determination to have a marriage some day or other, followed by the parties dwelling together in amity, are as valid and as binding as if made in the presence of the church.

It has, however, been expressly held in Maryland, that some religious ceremony must be added to the civil contract: *Denison* v. *Denison*, 35 Md. 361. On the Pacific coast the contract must be declared before a person duly authorized to take such declarations, and in the presence of a couple of witnessess: *Holmes* v. *Holmes*, Abb. U. S. 555. And a Massachusetts judge said that a marriage which was merely the effect of a mutual engagement between the parties, or solemnized by any one not legally empowered to do so, is not valid, nor is it entitled to the incidents of a marriage duly performed: *Milford* v. *Worcester*, 7 Mass. 48. In England no wedding is perfect unless made in the presence and with the intervention of a minister in holy orders, or other person authorized by statute; and so it is in Canada.

Whether there is a ceremony or not, intention being an all-important ingredient in this as in all contracts, it follows, notwithstanding novels and sensational stories to the contrary, that a marriage ceremony performed in jest does not make the pair husband and wife, even though a genuine J. P., who did not know whether he was tying the nuptial knot in joke or in earnest, officiated at the ceremony: *McClary* v. *Terry*, 21 N. J. Eq. 225.

Ladies, to whom appertain the privilege

of "naming the day," may choose any one of the seven for publicly assuming a new patronymic. Some question, it is true, as to whether a celebration of marriage on Sunday is a violation of law; but it is generally believed by lawyers that matrimony may be lawfully entered into on that sacred day. The reasons why are various; it is either because the frequency of the thing has in some measure protected it by usage, and the consequence of an opposite view would be disastrous, or because the contract of marriage is in the nature of a continuing contract, and may be regarded as made every succeeding day as long as the parties live together (2 Parsons on Contracts; or, and this applies chiefly to New York State, as civil contracts—and matrimony is such—made for a lawful purpose, and not tending to disturb the public peace and quiet, are valid and enforceable, although made on Sunday; so are marriages, unless it can be made out that they are contracts tending to disturb the public peace and quiet. Some marriages undoubedtly have that tendency, and so we would advise some ladies to be careful when they get married.—R. Vashon Rogers, Kingston.—*Albany Law Journal.*

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(Reported for the *Law Journal* by H. T. Beck, M.A. Student-at-Law.)

Bain v. McCarty.

Pleading.—Assignment.—Chose in action.

Where, in an action brought by the assignee of a *chose in action*, a plea that the assignment was made without consideration, *held* to be no defence.

[Sept. 5.—Mr. Dalton].

This was a motion to strike out a plea setting up as a defence to an action brought by the assignee of a *chose in action* that the assignment was made without valuable consideration.

Kennedy, for defendant, contended that the plea in effect merely raised the issue of beneficial ownership.

Mr. Shepley (Ferguson, Bain & Meyers) contended that that issue was raised by the plea of non-assignment.

Mr. Dalton thought that the plea should be struck out.

Order accordingly.

Snow v. Cole.

Writ.—Service.

If a writ of summons be served within the jurisdiction, it may be specially endorsed and final judgment may be entered against the defendant, although he is described in the writ as residing without the jurisdiction.

[Sept. 7.—Morrison, J.]

The facts of this case appear *ante*, *infra*, p. 223 on an application made before Mr. Dalton who set aside the judgment. From this decision the plaintiff appealed. The appeal was heard by Mr. Justice Morrison, who reversed Mr. Dalton's judgment, holding that upon the facts stated, the judgment had been regularly signed. It was however set aside on the merits, with the costs to the plaintiff.

Muir v. Kidd.

Ejectment.—Pleadings.

The A. J. Act has introduced into proceedings in ejectment "pleadings" within the meaning of the C. L. P. Act, which cannot consequently be filed during vacation.

[Sept. 8.—Mr. Dalton.]

This was a summons to set aside a replication and demurrer to an equitable defence, on the ground that they were filed during vacation.

Osler, for plaintiff, contended that the A. J. Act made provision for equitable defences and replications in ejectment. Previously there were no pleadings in ejectment. The act does not mention them as pleadings, but calls them statements, and the rules of pleading do not apply to them.

Mr. Shepley (Ferguson, Bain & Meyers) for defendant, contended that these statements since the A. J. Act had been treated as pleadings. The English Judicature Act substitutes statements of claim and statements of defence for the old Common Law Pleadings, and these statements are subject to the same rules as governed pleadings previously. The C. L. P. Act applies to all pleadings, and as soon as the law of ejectment was modified by the A.J. Act, so as to admit of pleadings, those pleadings must be regulated by the Procedure Act.

Mr. Dalton held that these statements under the A. J. Act were pleadings within the purview of the C. L. P. Act.

Order accordingly.

Davis v. Vandecker.

Costs.—Trespass.

Where the title to land is in issue upon the record, the plaintiff is entitled to full costs, although he has obtained a verdict of less than $8, and the judge at the trial has not certified for full costs.

[Sept. 11.—Wilson, J.]

This was a motion to review a taxation. The action was for trespass, the verdict being for the plaintiff for one shilling The judge at the trial had not certified for full costs. The plea of not possessed was on the record. Under these circumstances the Clerk of the Common Pleas refused to tax to the plaintiff any costs.

Mr. Read (Read & Keefer) for the defendant contended that 31 Vict. cap. 24, sec. 1, was express, and the certificate was necessary in order to enable the plaintiff to tax any costs.

Holman, for plaintiff, contended that the title to land was raised by the pleadings, and that, therefore, the plaintiff was entitled to full costs: *Williams* v. *Jones*, 15 W. R. 133 *Lake* v. *Briley*, 5 U.C. Q.B. 307; *Humberston* v. *Henderson*, 3 Prac. R. 40.

Wilson, J.—I think the plaintiff is entitled to full costs.

Humphries v. Ramsay.

Security for costs- Insolvent—Action by.

***Held*, that under sec. 39, Insolvent Act of 1875, an insolvent is bound to give security for costs in an action for a personal wrong.**

[October 3.—Wilson, J.]

This was an application for security for costs in an action by an insolvent for malicious prosecution.

S. M. Jarvis shewed cause. Sec. 39 of the Act of 1875 applies to causes of action which pass to the assignee. The whole section should be read together: *Smith* v. *Commercial Union Insurance Co.*, 33 U.C. Q.B. 529. This cause of action does not pass to the assignee: *White* v. *Elliott*, 30 U.C. Q.B. 253.

D. E. Thomson contra. The language of the section is imperative and applies to every action of what nature soever. If the insolvent were suing for a cause of action which passed to the assignee, he would be ordered to give security for costs irrespective of this provision: *Perkins* v. *Adcock*, 15 L. J. Ex. 7; *Elliott* v. *Kendrick*, 12 A. & E, 597; *Solomon* v. *Leek*, 9 Dowl. 361. *Smith* v. *Commercial Union* was decided on the English cases; sec. 42 of the Act of 1869 was not referred to. The only case in point is *Lee* v. *Moffatt*, 6 Prac. R. 284.

Wilson, J.—In *Smith* v. *Commercial Union* the Court did not notice the provision as to security for costs in the Insolvent Act of 1869, sec. 42. That provision is continued in the Act of 1875, sec. 39, and it is that, in all actions and suits of any "nature or kind whatsoever" brought by the insolvent before his discharge, he shall be required to give security for costs. If that provision had been before the Court in the case I have mentioned, it is not probable the decision would have been as it is. Since then, in the case of *Lee* v. *Moffatt*, *ante*, the Chancellor has decided, under the Act of 1875, that the insolvent must give security for costs in any suit he brings. I think that cannot have been what was meant by the Legislature, although they have enacted it because it. restrains the insolvent suing in cases in which the assignee has no interest. If the assignee employed the insolvent to help in winding up the estate, the insolvent could not sue for his wages unless he gave security for costs, which he might not be able to do. So if the insolvent had a cause of action purely personal—I mean one which did not pass to the assignee—against a municipal corporation, which would have to be sued for within three months, he might forfeit his claim if not able to give the security within the three months, which would benefit nobody but the corporation, which was a wrong doer. So he might be prevented from suing as an executor.

With every desire to assist the plaintiff, I find the enactment too plain and too strong to be got over. The security is to be *such* security as the Court shall direct; perhaps I can, under the circumstances, make it easier than it usually is. The order must go, costs to be costs in the cause.

Order accordingly.

CHANCERY CHAMBERS.

Carley v. Carley.

Alimony. — Witness Fees.— Counsel Fees.— Costs.— Solicitor, payment of costs by

[Sept. 17.—Mr. Stephens.]

This was an application in an alimony suit for an order for payment of witness fees and counsel fees by the defendant to the plaintiff, in order to enable her to go to a hearing. There was not the usual provision for disbursements in the order for interim alimony.

H. Cassels, for defendant, asked that the motion be dismissed with costs, to be paid by

the plaintiff's solicitor, on the ground that similar applications had been made and dismissed.

Watson, for plaintiff.

The Referee thought that he could not make the order, as the moneys asked for had not been actually paid; but that as no similar case had been reported he could not order the plaintiff's solicitor to pay the costs. Under the circumstances he thought that the motion should be dismissed with costs.

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

Re Andrews.

From C. C. Leeds & Grenville.] [Aug. 31.

Insolvent Act, 1875—*Powers of assignee.*

Held, (Patterson, J. A.,) affirming the judgment of the County Court, that under sec. 39, nsolvent Act, 1875, an assignee represents the creditors for the purpose of setting aside a mortgage void for want of compliance with the Chattel Mortgage Act.

Bethune, Q.C., for the appellant.

Delamere for the respondent.

Appeal dismissed.

McMartin v. Hurlburt et al.

From C. C. Northumberland & Durham.] [Sept. 15.

Exemption from seizure — Values — Division Court Bailiff — Notice of action—Jus tertii.

The defendants, Division Court bailiffs, were sued for selling a horse, of the value of $60, under an execution, which the plaintiff claimed was exempt from seizure. The horse was sold for $47.50. At the trial the plaintiff swore that the horse was worth $120, and the purchaser swore that he was worth $90.

Held, (Burton, Patterson, Moss, JJ.A., and Galt, J.,) that the value of the horse was to be determined by the whole evidence, and not by an exclusive reference to the price it brought at the sale.

Held, also, that the defendants were not entitled to a notice of action with the name and abode of the plaintiff endorsed thereon under C.S. U.C. cap. 126; a notice under sec. 193 of the Division Court Act, being sufficient.

At the time of the seizure the horse was included in a chattel mortgage given by the plaintiff to one Martin.

Held, that the defendants could not set up a *jus tertii*.

Armour, Q.C., for the appellant.

H. Cameron, Q.C., for the respondent.

Appeal allowed.

Shannon v. The Hastings Mutual Fire Insurance Co.

From C. P.] [Sept. 15.

Insurance—Misdescription of premises—Survey made by agent—Further insurance.

One M., a previous owner of the property, at the request of the defendants' agent filled in an application for insurance, but on its being read over to the insured, he objected to the distances stated of the contiguous buildings. The agent, who had previously visited the premises, then undertook to go and measure the distances himself, and make the application correct before forwarding it. The insured thereupon signed the application, but the agent forwarded it to the head office without filling in the correct distances.

By one of the conditions of the policy, it was provided, that if an agent should fill up the application, he should be deemed to be the agent for that purpose of the insured, and not of the company, "but the company will be responsible for all surveys made by their agents personally."

The Court (Burton, J.A., Harrison, C.J., Moss, J.A., and Blake, V.C.,) affirming the judgment of the Common Pleas, *held*, that what the agent undertook to do was within the meaning of the proviso, and that the agent must be presumed to have made the survey so as to render the company liable.

It was proved that the plaintiff had mailed the company a notice properly addressed of a further insurance, and that they had not within two weeks thereafter notified the insured of their dissent.

Held, that the notice must be presumed to have reached the company, and that they must be deemed to have assented to it under 36 Vict. cap. 44, sec. 38, O.

The condition as to proof of loss required a certificate from the magistrate *most* contiguous to the place of fire.

Held, that the condition was null and void as being unreasonable.

Bethune, Q.C., with him *Dickson*, for the appellants.

McCarthy, Q.C., with him *Strathy*, for the respondent.

Appeal dismissed.

ROONEY v. LYON.

From Q.B.] [Sept. 15.

Insolvent Act, 1875—Confirmation of discharge.

Held, (Burton, Patterson, Moss, JJ.A., and Proudfoot, V.C.,) that an order confirming a deed of composition and discharge is final and conclusive as to all matters preliminary to its making, unless it has been reversed on appeal.

M. C. Cameron, Q.C., *Monkman* with him, for the appellant.

T. Ferguson, Q.C., for the respondent.

Appeal dismissed.

BROWN v. GREAT WESTERN RAILWAY CO.

From Q. B.] [Sept. 15.

Two lines crossing—Collision—Use of brakes—Negligence.

The defendants' railway crossed the Grand Trunk Railway on a level. The train on the defendants' line was approaching the crossing, and the air brakes for some reason failed to act. It was then too late to stop the train with the hand brakes or by reversing the engine, though every effort was made, and a collision occurred with a train on the other line, of which the plaintiff was a conductor, by which he was seriously injured.

It was shewn that these brakes were in common use on railways, and that the brakes in question had been twice examined and frequently used on that day, and found all right and effective.

Sec. 143 Con. Stat. C. cap. 66 enacts that "every locomotive or railway engine or train of cars on any railway shall, before it crosses the track of any other railway on a level, be stopped for at least the space of three minutes."

Held, (Hagarty, C.J. C.P., Patterson, J.A., and Galt, J.,) Moss, J.A., dissenting, that the defendants were guilty of negligence in not applying the air brakes at a sufficient distance to enable the train to be stopped by other means in case of these brakes giving way.

Held, also, that the statute imposed upon the defendants an absolute duty to stop for three minutes, and that their omission to do so rendered them liable for the injury sustained by the plaintiff.

M. C. Cameron, Q.C., for the appellants.

W. Rock, Q.C., for the respondent.

Appeal dismissed.

HOWELL v. MCFARLAND.

From C. C. Haldimand.] [Sept. 15.

Chose in action—Assignment of—35 Vict. cap. 12.

One of two partners assigned to the plaintiff a debt for goods sold to the defendant by a deed professing to transfer his partner's interest as well as his own. It appeared that he had a general power to transact the business of the firm, and that his partner afterwards ratified the sale.

Held, (Burton, Patterson, Moss, JJ.A., and Galt, J.,) that the plaintiff was entitled to recover under 35 Vict. cap. 12, as the assignment was within the scope of the partnership business, and covered by the agency of one partner for the other; and that even in the absence of authority, his partner's subsequent ratification was sufficient.

Held, also, that the fact that the contract was by deed did not deprive it of the effect of a simple contract.

Bethune, Q.C., for the appellant.

Robinson, Q.C., for the respondent.

Appeal allowed.

LA BANQUE NATIONALE v. SPARKS.

From C. P.] [Sept. 15.

Promissory note—Stamps—31 Vict. cap. 9, sec. 4, D.

On the 9th September, 1875, defendant endorsed a promissory note made by S. & C., bearing that date and payable to him four months after date at the plaintiffs' branch at Ottawa. On the same day C. deposited it with the plaintiffs, authorising them to fill it in for the amount of S. & C.'s then due paper, as also other paper falling due before the 22nd October. On the 21st October, the plaintiffs filled in the note for the amount due, and affixed stamps sufficient to cover double duty which were obliterated by writing across them the date on which they were so affixed, namely, 21st October.

Held, (Burton, Patterson, JJ.A., Harrison, C.J., and Moss, J.A.,) that the stamps were not properly cancelled; for if affixed as agents of the maker then, under sec. 4 of 31 Vict. cap. 9, D., the date of the obliteration must accord with that of the note; and if the plaintiffs acted as a subsequent holder, then under sec. 12, as substituted by 37 Vict. cap. 47, sec. 2, the initials or name as well as the date are required.

Snelling for the appellant.

M. C. Cameron, Q.C., for the respondents.

Appeal dismissed.

McDONALD v. GEORGIAN BAY LUMBER CO.

From Chancery.] [Sept. 15.

Foreign bankruptcy—Assignment thereunder.

D., who was a naturalized British subject, possessed of a large quantity of lands in Canada, residing in the State of New York, was with his co-partners duly declared bankrupt by the Courts of that State on the 15th November, 1873, and on the 14th February following, a trustee of their estates was duly appointed, when the bankrupts executed a deed purporting to convey all their estate for the benefit of their creditors.

The Court (Burton, Patterson, Moss, JJ.A, and Blake, V.C.) *held*, reversing the judgment of the Court of Chancery, that the deed did not affect the bankrupt's lands in Canada, as there was no evidence that he intended them to pass when the deed was executed.

McCarthy, Q.C., for the appellant.

Crooks, Q.C., for the respondents.

Appeal allowed.

KAY v. WILSON ET AL.

From Chancery.] Sept. 15.

Mortgage—Statute of Limitations—Wild lands.

In 1835, D. sold certain wild lands to S., and a mortgage was executed by the purchaser for the consideration money. In 1838, S. sold and conveyed his equity of redemption to K. In 1842, D. filed a bill of foreclosure against S., on which a final decree of foreclosure was obtained in 1845; but to this suit, K., through some oversight, was not made a party. K. died in 1876, and the plaintiff, his heir at law, filed a bill to redeem in June of that year. The defendants claimed under conveyance from D. made after the foreclosure.

It was proved that D. had gone upon the land, after his title had become absolute at law in 1838 or 1840 to ascertain if there were any trespassers upon it: that he had asked one Hardy to look after the land, and offered to sell it to him: that he had sold it to one Steers in 1847 as absolute owner, and that the taxes had been paid by the defendants and those through whom they claim.

Held, (Burton, Patterson, Moss, JJ.A., and Proudfoot, V.C.) that there was sufficient evidence of possession having been taken more than 20 years before the bill was filed, and that the plaintiff's right was barred.

Boyd, Q.C., for the appellants.

Armour, Q.C., for the respondents.

Appeal dismissed.

MOLSON'S BANK v. MACDONALD.

From Q.B.] [Sept. 15.

Collateral mortgage—Right of action

The Bank held certain notes made by Mitchell Macdonald, the son of the defendant, who had indorsed them for his accommodation, and also certain other notes unsecured by any indorser Upon being pressed for payment of a portion of the notes, Mitchell Macdonald gave a mortgage to secure the whole, which purported to be made in consideration of $4,300, and was subject to a proviso to be void on payment of that sum with interest at 8 per cent., in one year from date, and then added, "the said sum being represented by certain promissory notes now under discount and held by the mortgagees, and any renewals or substitutions therefor that may hereafter be given for the same, all to be paid within one year."

Held, (Hagarty, C. J. C. P., and Burton Patterson and Moss, J. J. A.) affirming the judgment of the Queen's Bench, that the defendant was liable as the mortgage was merely collateral and did not suspend any right of action on the notes.

Dr. Spencer and *C. Moss* for the appellant.

C. Robinson, Q.C., for the respondent.

Appeal dismissed.

CHANCERY.

THE CORPORATION OF THE TOWNSHIP OF WALLACE v. THE GREAT WESTERN RAILWAY CO. AND THE WELLINGTON GREY & BRUCE RAILWAY CO.

Chancellor.] [Sept. 12.

Agreement to erect and maintain station—Specific performance.

This was a suit to compel the defendants to maintain a regular way station at the village of Gowanstown, in pursuance of an agreement in that behalf entered into between the plaintiffs and the Wellington, Grey & Bruce Railway Co. on the 17th of May, 1872, whereby, as stated in the bill, in consideration of the sum of in debentures of the said municipality, the Wellington, Grey & Bruce Railway Co., "covenanted and agreed with the plaintiffs to erect, keep and maintain on the said extension a permanent freight and passage station at the said village of Gowanstown, such station to be built within a distance of six chains from the southwesterly angle of lot number 24, in the fifth concession of the plaintiffs municipality, provided no natural or engineering difficulties prevented its being placed within those limits, but if the chief engineer for the time being of the

Great Western Railway Co. should certify that any such difficulties intervened then within twelve and a half chains from the said angle of said lot."

It was proved that the principal inducement to the ratepayers and council for granting this bonus was the undertaking of the company to erect and maintain a permanent passage and freight station at the village of Gowanstown. The necessary buildings were accordingly erected and maintained for sometime by the Great Western Railway Co., who were lessees of the road, but the station was afterwards disused. The municipality thereupon filed a bill against both the railway companies for the purpose of compelling them to continue and use the station and buildings.

Spragge, C., before whom the cause was heard, thought that the Great Western Railway Co. was bound by the agreement between the plaintiffs and Wellington, Grey & Bruce Railway Co., and made a decree as against the Great Western Railway Co. with costs, and dismissed the bill as against the Wellington, Grey & Bruce Railway Co. with costs.

Goyean v. Great Western Railway Co.

Chancellor] [Sept. 12.

Railway terminus—Land conveyed on condition.

The plaintiff on the representations of parties interested in the location of the western terminus of the Great Western Railway, conveyed to the company a lot of land in the town of Windsor, without any money consideration being paid therefor, the deed reciting that the same was conveyed for the purpose and on the condition that the terminus should be placed there, and "the execution of which condition was the real consideration for this grant." The company did construct the necessary buildings for the purpose of the terminus, including passenger and freight stations, and continued to use them for several years, when they discontinued the use of the passenger station, and were about establishing it in another locality. On a bill filed to restrain the company from doing so,

The Court (Spragge, C.) *held*, that the company were bound to retain the terminus on the properties conveyed to them by the plaintiff and one Hall, or in default, the land conveyed by the plaintiff should revest in him; and ordered the company to pay the plaintiff his costs of suit: and, if plaintiff desired it, directed a reference to the Master at Sandwich to ascertain and report whether the condition had been performed.

Wilson v. McCarty.

Chancellor.] [Sept. 26.

Partnership—Interest on capital.

In this case, two partners, Wilson & McCarty, agreed each to furnish a certain amount of capital wherewith to carry on business together in partnership. In pursuance thereof, Wilson did bring in the amount stipulated, but McCarty never brought in any sum. In a proceeding afterwards to wind up the partnership estate, Wilson claimed to charge McCarty's representatives with interest on the amount agreed to be paid, which claim the Master at Barrie refused to accede to, and on appeal, this ruling of the Master was sustained.

Spragge, C., in dismissing the appeal on that ground, referred to the language of Lord Hatherley, when Vice-Chancellor, in the case of *Rishton* v. *Grissell*, L. R. 5 Eq. 326, "No interest is chargeable by one partner against a co-partner . . . The express point has been decided in this Court, that, unless there be an express stipulation or a particular course of practice shewn by the partnership books to the contrary, interest between partners is not allowed."

CORRESPONDENCE.

The Law of Dower.

To the Editor of the Law Journal:

I stated in my last letter some reasons why the inchoate right should be considered as within secs. 5 and 11 of the C. S. U. C. cap. 90; and here I propose to dwell for a short time upon the case of *Allen* v. *Edinburgh, L. A. Co.* 19 Gr. 248, where the point actually arose. The Court there held, that the wife's interest was not available for creditors, and an injunction restraining the sale of the right under execution was granted. The learned Chancellor seems to have decided the case solely upon the authority of *McAnnany* v. *Turnbull*, 10 Gr. 298. His Lordship argues that if the interest in that case were that of a wife, the question is already decided there, and that case must be followed. But the word "widow," which is therein used, points to the fact, that it is the consummate right to dower which

was the subject of discussion in that case. If so, then His Lordship says, "all the reasoning of the late Chancellor, by whom the judgment in that case was delivered, would apply *a fortiori* to this case." And he rests his decision on the grounds contained in the following expression of his opinion: "If I give effect to the argument for the defendants, I must hold, that what the learned counsel contends is a contingent interest in lands is made saleable by the statute; although the *same interest vested* is not made saleable. The judgment in *McAnnany* v. *Turnbull* proceeds upon this, that before dower assigned, a widow has nothing in the land. * * If that be so, it must be so *a fortiori* in the case of a wife whose right is inchoate." If the conclusion arrived at by the learned Chancellor be correct, it follows that this interest is neither a contingent, nor an executory, nor a future interest, nor a possibility coupled with an interest in land; or rather this must have been established before the conclusion above set forth could have been arrived at. If not one of those interests, what then is it? It is not a present estate, nor yet a vested interest. It is not a right of action, as we shall presently see; nor is it a right of entry; for she has none in respect of her dower until after the death of her husband and its assignment by the heir. How then shall we describe it except as coming within one of the terms used in the Act; for we have already seen that it is something more than a mere possibility? The result of the learned Chancellor's conclusion, not only militates against any contention for the presence of the element of contingency in the right, but also conflicts with a *dictum* of Mr. Justice Wilson's in *Miller* v. *Wiley*, who, though not deciding the point, thought that the wording of this Act, being so broad and general, might include this interest.

The conclusion arrived at by his Lordship rests *first* upon the assumption that the widow, as regards her right to dower, has, upon her husband's decease the same interest, *i. e.*, one containing the same inherent qualities, as that which she had prior thereto, but in a different form; and *secondly* upon the fact, though not expressed, yet implied, that an anomaly would be the result of a contrary decision. With regard to the first ground, considering that in this case, the very point at issue is the applicability of the statute, and looking at the concluding words of the quotation from *McAnnany* v. *Turnbull* in the judgment, we may, I think, conclude that the word "nothing" as used by the learned Chancellor bears the meaning expressed by the following paraphrase: "No such contingent or uncertain right or interest as may be reached by any of the phrases used in the statute." His Lordship's reasoning seems to be this: "Because, as was held in *McAnnany* v. *Turnbull*, the consummate right has no such qualities annexed to it, or inherent in it as to bring it within any of the descriptive phrases, 'a *contingent*, an *executory*, or a *future interest*, or a *possibility coupled with an interest in land*,' it follows, *a fortiori*, that the inchoate right has none of these qualities; and because the consummate right, for lack of these qualities is excluded from the influence of the statute, therefore the inchoate right, for the same reason, is not affected by it." This proposition generalized, may be expressed as follows: That the qualities of those rights which are already vested, and depend for their full enjoyment only upon the exercise of the volition of the person entitled thereto, and those of rights which are as yet to vest, and whose enjoyment depends, not upon the exercise of the volition of the person to become entitled thereto, but upon the happening of an event entirely beyond his control, are of such like nature, that, if certain words

will not describe the former class, neither will those words describe the latter; or, if the one be not found to fall within the embrace of a certain phrase or number of phrases, neither will the other. A proposition which, it will be admitted, cannot be for a moment conceded.

Were the assumption correct, that the interest when consummate is the same as the interest inchoate, *i.e.* contains the same inherent qualities; and that upon the death of the husband, by the disappearance of the element of contingency, it simply appears in a more highly developed form, then the conclusion at which His Lordship arrives might have been conceded without argument. But if it can be shown that the inchoate right is not the same interest as the vested right, (though existing in the same person, yet at different times) but is of a totally different nature by reason of the element of contingency that may be shown to exist in it, then the reasons given in his Lordship's judgment will not be a sufficient warrant for the conclusion. For the judgment proceeds upon the assumption that these two rights are homogeneous.

With all due deference to a learned judge, the greatest respect for whose opinion I entertain in common with the whole profession, I venture to submit, that the most we can say is, that these two rights, the inchoate and consummate, are *different interests* in the *same person*, not the *same interest* in *different forms*. That the inchoate right is not the *same interest* as the consummate or vested right and has none of its properties, seems manifest. The very element of uncertainty or contingency, which, I contend, serves to bring the inchoate right within the statute, disappears upon its consummation, and a *new right* accrues to the widow, namely a right of action; or, as expressed by Wilson, J., "a right to have an estate in the land established for her;" and by Van Koughnet, C., "a right to procure something *i.e.* dower; neither of which rights she had before her husband's death. And further it is said in *McAnnany* v. *Turnbull*, "she cannot * * assert any description of right in it except by *action* to procure an assignment;" thus, by an exhaustive or exclusive process, describing it as nothing else than a mere *right of action*. Again, "the common law regards the title to dower for many purposes as a mere *right of action*:" Blake, C. in *Rose* v. *Simmerman*, 3 Gr. 600. These learned judges seem to have fully described the interest of the widow before assignment of dower in the words quoted. It is plain then that, before the husband's death, not having arrived at that period when she may "assert any description of right," since she has, as yet, neither "a right to have an estate established for her," nor "a right to procure dower," she cannot be said to have the *same* interest as that last above described. She has in reality little more than a right to wait for a contingency which may never happen—to wait for the probable arising of a right of action. But the husband's death having happened in her lifetime, she now emerges from her former state of uncertainty, and becomes clothed with a new interest, entirely devoid of any contingent ingredient, inasmuch as she has a right *presently* to maintain an action. Are these two interests the same in any respect, except in that of their ultimate object? The answer is suggested by the following passage from Story Eq. Jur. 12th Edn. by Perry, 1040 (*c.*):—She "has nothing but the contingency, which is a very different thing from the right immediately to recover and enjoy the property." But to this it will be answered, that it will not follow as a logical consequence that these two rights will be found to be of exactly the same nature in every respect, simply because they are both excluded from the purview of a certain clause in the statute;

that it may well be that they might both be excluded and still be totally different in nature from one another. Very true! But when they are both excluded for the *same reason*, or, when one is excluded simply because the other is (which amounts to the same thing), we must expect to find certain qualities or characteristics common to both of them. If the one be found to possess none of the qualities that the other does, or (which is sufficient for our present purpose) if those qualities mentioned by the statute be not common to both, they can no longer be governed by the same rules. If the inchoate right be found to possess certain qualities which the vested right does not possess, and of so different a nature as to bring it within another class of rights, then the reasons which will apply to the exclusion of the one will not apply fully to the exclusion of the other. At the least, its possession of those qualities which the vested right does *not* possess, calls for a reason why *they* should not bring the inchoate right within the reach of the statute, even though it be found that it bears a certain resemblance in other respects to the vested right, and might on the latter account be excluded; which reason is not given in his Lordship's judgment.

The real effect of the statute seems to be that, while it did not change the quality of that already existing, nor create any new interest in the wife, it provided a method of dealing with the already existing interest which was apparently not extended to the consummate right. If, then, it is not the same interest, but a totally different right, his Lordship's premises are faulty; and a conclusion founded upon false premises, though logically consequent thereupon, cannot but be erroneous.

With regard to the second ground, whether the avoidance of such an apparent anomaly in the law is, or is not, a desirable end, I do not propose to enquire. That other anomalies do exist, will not be disputed. One, in particular, is referred to, in his argument, by the learned counsel for the defendants in *Allen* v. *Edinburgh*. A lease for three years may be made by parol; but an assignment thereof must be in writing. Now, reasoning according to common sense views, we should no doubt arrive at the conclusion that where an estate in lands was allowed to be called into existence in such an informal way as by word of mouth, surely the subsequent dealings with it, which are of much less relative importance than its creation, might also be by word of mouth. This would probably be a just enough conclusion, and would save an anomaly, if the statute had not enacted otherwise.

An apparent injustice exists with regard to the doctrine of notice, as affected by the Registry Act, sec. 67. A purchaser for value, without notice of a prior deed, may be defeated by notice of it between the time of getting his deed and registering it; a principle contrary to general policy of the Registry laws. It was noticed in *Millar* v. *Smith*, 23 C. P. at p. 58, by Gwynne, J., who said in reference to it, after adverting to the doctrine of notice in Equity:—"My moral conviction is, that" the introduction of the equitable doctrine of notice "was the intention of the Legislature, although the language literally does not express the equitable doctrine. I have come, however, to the conclusion, that as we have no means of judging of the intention of the Legislature, otherwise than by the language used, we must give effect to the clause *as it is expressed*."

Again, where, under C. S. U. C. cap. 84, a woman released or barred her right to dower by a conveyance to which her husband was *not* a party, an examination touching her consent was

made requisite. Though, when her husband *was* a party, she need not have been examined. When we consider that the object of the examination was to ascertain whether the husband had coerced his wife to join in the deed, which would be more likely to happen where he was also a party to the instrument than where he was not, it is difficult to see why it was so enacted. Thus, in one of two instances, imposing a precautionary measure, where there seems to be no reason for it; and in the other, omitting it, where the very state of facts exists, which furnished the reason for the law in the first place. See remarks of Robinson, C. J. in *Howard* v. *Wilson*, 9 U.C. Q.B. 450.

Other anomalies, not depending on the wording of the statutes, have existed; such as, that the wife of an idiot might be endowed; though the husband of one should not be tenant by the courtesy: Co. Litt. 31. See also Archbold's Blackstone, p. 129, n. 33, where it is laid down, that Courts of Equity, although not allowing the wife of a *cestui que trust* to be endowed of the trust, yet allowed courtesy of the trust; a seeming partial diversity, for which Lord Chancellor Talbot said he could see no reason; but which, as he found it settled, he did not feel himself at liberty to correct: 3 P. Wms. 234.

Whether an Act is expedient in its terms, or tends to create confusion or anomalies, is not, it will be admitted, our object in examining the state of the law; but rather the ascertainment of the law, as enacted. It is submitted that we are not called upon to say, whether the act in making the inchoate right an apparently higher interest in law, than the consummate right, produces an anomaly, nor, by showing that such an intention is apparently an absurd one, to say that *therefore* the Act is not to be so construed; nor, whether it was actually the intention of the Legislature, or unwittingly done, to include this contingent right in, and exclude the vested right from its provisions. If it be so enacted, I apprehend that to be sufficient.

That a possibility of succeeding for life to the third part of an estate, depending on the chance of the wife's surviving her husband, is a higher interest in law than the right of the widow immediately to have that estate set out, does at first seem too monstrous a proposition to be entertained. But, after all, this is not the exact deduction from the foregoing remarks. It is rather this, that, as already shown, the interest is not changed by the act, nor in any way exalted above the consummate right, except in so far as the statute has attached to it the incident of a capability of being dealt with in a way which it was apparently not thought fit to extend to the consummate right. But, even supposing the first enunciation to be correct, we must bear in mind that it does not depend for its proof upon the close and logical reasoning of learned judges and commentators; but is the offspring of a statute. Because the plain and manifest reading of a statute will produce an apparent anomaly in the law, we can hardly *solely thence* infer that such a meaning was not the intention of the Legislature; and that we must cast about for some other meaning, which will save the anomaly. There is little reason to doubt that the inchoate right is described by some one of the very broad expressions used in the 5th section of C. S. U. C. cap. 90. And if so, it is difficult to see why we should not, to use the words of Mr. Justice Gwynne, "give effect to the clause *as it is expressed*."

If a reason for the provisions of the Act, founded on principles of moral philosophy or ethics, be sought for, we may find it in this, that, while the husband is alive, the wife is provided for. Supposing her right to dower, to be

the law the air of a science, who found it made available for creditors, no serious harm is done by its seizure. But, on the husband's death, having lost her supporter, cherisher and protector, assuming that her dower is all she has to look to for a maintenence (a state of affairs not infrequent), the creditors, not having availed themselves of their rights in the husband's lifetime, are precluded now from seizing her right, by assigning which, (as we shall hereafter see she may do) she may provide herself with funds in order to her support and maintainance in some degree at least. And this supposition is not at variance with the favouritism shown by the Courts to the widow in other cases even at the expense of creditors.

I shall attempt an examination of the second division of this part of the subject, namely, that relating to the consummate right, in my next letter.

E. D. A.

Toronto, Sept., 1877.

REVIEWS.

Commentaries on the Liberty of the Subject and the Laws of England relating to the Security of the person. By James Paterson, Esq., M.A., Barrister-at-Law, 2 vols. London, Macmillan & Co., 1877.

The immortal Blackstone said "that a competent knowledge of the laws of that society in which we live is the proper accomplishment of every gentleman and scholar."

Things are very different now from what they were in his day. He wrote to the scholar and the gentleman, for from the class to which they belonged was almost exclusively taken those who were concerned in the laws either as makers or expounders. Now, however, these positions are as open practically, as they then were theoretically, to the most humble in station of Her Majesty's subjects. The luminious and elegant essays of Blackstone have held sway in various forms and editions even to the present day, and nothing has so far, as a whole, approached them in excellence. He "first gave to a skeleton and clothed it with life." It may, however, be admitted without detracting from the fame of this great writer, that his arrangement was in many respects faulty.

Mr. Patterson whilst granting his due meed of praise to the great commentator, has not thought fit to use slavishly the model Blackstone constructed, but has, as we shall presently see, taken a line of his own quite novel and eminently in accordance with the instincts of the people to whom he writes.

Blackstone's commentaries were published in 1765, he having previously, in 1753 and subsequent years, delivered the same matter as lectures in the University of Oxford.

The giant strides made since that time in relation to the subjects of which he wrote are well stated in the words of the writer whose book is now before us:

"During the century that has elapsed since Blackstone's work was published, hundreds of volumes of statutes, reports and disquisitions have been produced, modifying, reversing, or abandoning many false positions once thought unassailable. And during the same period all European nations have lived ages. Communities, princedoms, powers, and dominions have disappeared and reappeared under new names or new combinations. Organic changes have developed noiselessly in a night. All forms of government constitutions, systems of laws, have, more or less, been put on their trials and tested by the inexorable logic of first principles. Every timber of the vessel has felt the strain whatever, and wherever a fault existed, the fault has been seen and felt, and in not a few instances has been amended. The utilitarian has been abroad and has marked many a weak point in the armour instead of invoking the traditions of Greek or Roman ancient or mediaeval civilizations to help him has found a ruder questioning all sufficient, and a convenient touch stone in every market place and vestry. A friendly echo now follows this investigator everywhere. It can scarcely fail to be apparent that explanations of processes, methods and axioms which passed current with the learned a century ago, can scarcely now claim the plaudits of our wider and more critical audience. The legislature itself, which is the vigilant sentinel to guard against the advances of corruption and revolution, contains new representatives commissioned by multitudes who were then without the pale; powers and voices, not then dreamt of, now claim an undisputed hearing. New points of departure are suggested in many a settled routine, and still an interminable procession of amendments fills up the vista of the future. And though panting time toils after these in vain yet is the hope of higher and still higher and juster laws not one jot abated. Civilization may be incapable of definition, yet it plainly involves a consciousness that advance-

ment has already been made from worse to better, and that from each vantage ground gained it would be degrading and impious to retreat."

Mr. Patterson with the same end in view as his predecessor, has, as we have said, struck out a new path, peculiarly his own, and with especial reference to the liberty of the subject, which is in truth the ruling principle of the Anglo-Saxon race. In his preface he says:

"The author has attempted to take the reader over the same grounds [as that traversed by Blackstone] by a route altogether different, and always carrying the lamp of the liberty of the subject into every recess, examining each leading detail by the light it supplies, and trying, if possible, to mark at each turn where tradition ends and reason begins—'where freedom broadens slowly down from precedent to precedent.'"

The two volumes before us contain a general introduction to the subject of Law, discussing the current definitions and divisions under the general title "The liberty of the subject," and exhibiting that division of what he terms the substantive law, entituled the "Security of the Person," in complete detail, showing how the law guards personal freedom, and what have been the leading changes through which it has passed.

It will be seen from what we have said that the author does not, so far as he has gone discuss what Blackstone would call "The Rights of Things," except so far as they are incident to the security of the person and the liberty of the subject. We should think it quite possible that the author has in view hereafter to continue his illustrations of the great division of the law untouched in the two volumes before us. We trust he may. The great merit of the work before us gives promise that a new legal writer has appeared on the scene who will take his place as one of the best that England has produced.

We will now give an example, taken haphazard, of the style adopted by the author. He has been speaking of how far suicide is included in murder. He then continues:

"*Perplexity of the ancients as to suicide.*—The ancients were not unanimous in the view they took of the lawfulness of suicide. Plato thought it justifiable when one was overwhelmed by calamity or poverty*. Aristotle condemned it as an injury to the state.† The Gymnosophists, on reaching a certain age, or when threatened with disease, burnt themselves, after inviting their friends to a feast.‡ Cicero asserted the doctrine of Pythagoras, that it was unworthy to abandon one's post and leave life, without the order of Providence, yet praised the suicide of Cato, who resolved to die rather than look on the face of a tyrant.§ Virgil, Cæsar, Ovid, Seneca, Plotinus and Porphyry seemed to think suicide a shrinking from duty. But there was considerable vagueness in the view held. The Stoics generally viewed suicide as one of the ways of displaying their indifference to life and its troubles. The Stoical type of moral excellence, which was that aimed at by the educated classes of Rome, taught that death was not to be feared, and that rewards or punishments in the present or future life were not the true motives of virtue. Whatever views in the abstract may have been held, many distinguished ancients committed suicide.‖ But no writer on this subject has surpassed Marcus Antoninus, who says, "it becomes a man of wisdom neither to be inconsiderate, impetuous, or ostentatiously contemptuous about death, but to await the season of it as of one of the operations of nature."¶

The author then further discusses the subject under the headings: Influence of Christianity on Views of Suicide—Capital Punishment by way of Suicide—Gladiatorial Contests a kind of Suicide; and then proceeds with:

Suicide how far a crime at common law.—It seems to have been a doctrine of our common law at an early date, that murder included suicide, and that the latter act was *ipso facto* a felony.** Hence forfeiture of goods and chattels was a legal consequence of the act, and as the suicide was his own executioner, the forfeiture accrued on the act, since conviction was rendered impossible. But though trial was super-

* Laws, lib. ix.
† Ethics, v.

‡ Q. Curt. b. viii. c. 9. The learned have remarked that there is nothing expressly stated in the law of Moses as to suicide, and that it has not generally been deemed to be included in the prohibitions of the sixth commandment.—*Michaelis Com.* § 272. But if the learned have so settled this point, it only shows the absurdity of interpreting divine laws in the way that courts of law would interpret most municipal laws; for the subject matter, the object and effect of the two kinds of laws differ *toto cœlo*.—See *ante*, p. 113.

§ De Senect. c. 20; Tuscul. i.; De Offic. b. i. c. 31.

‖ One Hegesius, mentioned by Cicero, was called the orator of death, from the persuasive manner in which he painted this final relief from care, and many voluntarily rushed to the tomb with enthusiasm.—*Tusc. Quæs.* lib. i.; 2 *Lecky, Hist. Mor.* Cocceius Nerva, a prosperous lawyer is said to have committed suicide owing to the sad state of public affairs in the republic. —*Tac. Ann.* b. vi. c. 29.

¶ M. Anton. b. ix. c. 3. The ancients record with what indifference the Indians of their time ascended a funeral pile and burnt themselves to death, it being, as they represented, an eastern custom. Calanus did so in presence of the whole army of Alexander the Great. And a venerable Brahmin in an embassy from Porus to Augustus did the same thing at Athens.—2 *Maurice, Ind. Ant.* 107. The Siamese, indeed, considered it a laudable act of piety.—3 *Univ. Mod. Hist.* 336. In India, so eager were men to join in drawing the car of Juggernaut, and so confident if they could only pull a rope, they would go to heaven, that in their excitement they fell beneath the wheels, not unwillingly.—*Clarke, Ten Relig.* 134.

** 1 Hale, P. C. 412.

seded, an inquisition by the coroner was held on the body. And yet this doctrine, that murder included suicide, tends to inconsistencies, and cannot be logically acted on.* It is self-evident, however, that life is not a species of property, and that the law could never vindicate suicide on the plea, that one is thereby only destroying at pleasure what is one's own. It is in every view a wrongful act, or at least one without legal excuse. Hence when one person asks another to kill him, the law views it as nothing less than a murder, for one had no right to give such a command, and the other ought to have known the same, and ought not to have acted upon it. In such an event he that is killed is deemed no suicide, but the killer is deemed a murderer.†

Again, two persons sometimes agree to kill each other and one may in the result be killed and the other not. In this event it may become necessary to ascertain in what position they stand, for it may often be difficult to decide whether one who is killed under such circumstances commits suicide, or is murdered by his confederate. This question will mainly turn on whether the person killed by his own order and contrivance contributed in a material degree to his own death, or whether the material part was contributed by his partner.‡ Each is considered the murderer of the other, and if the purpose is only partly executed, this is the footing on which the mutual guilt is judged.§

The same subject is then concluded by elaborating upon the ancient punishment of suicide, its punishment in England, and other legal consequences flowing therefrom.

This work is full of deep philosophical reasonings and historical research, whilst at the same time the details, fully introduced to illustrate the subject treated of, are so accurately laid down as to make the book one of great value as a text book for the practising lawyers. It is a work peculiar to itself, shewing the author to be a man of deep thought, great industry and power of arrangement. It is a book which like some others of a cognate nature,—such for example as Todd's Parliamentary Government,—should be plentifully used in the seminaries of learning, not merely for their intrinsic merit and as means of instruction, but for the free, brave, manly thoughts that pervade them, and marking them as fit exponents of that law open to all and favouring none, and teachers of that spirit of liberty without license, which we claim to be the heritages of our race.

We look upon this book as one of the greatest additions of the day to the library of legal literature, and we most heartily recommend our readers to lose no time in supplying themselves with it. The lessons it conveys cannot but be most beneficial to all classes.

As regards the volumes themselves, that which comes from Macmillan's press cannot be very inferior, but we would suggest that a second edition should give the matter in a little less cramped form. The size is convenient, but neither is the paper as good as it might be, nor is there enough of it.

* R. v. Burgess, 1 L. & C. 258.
† 1 Hawk. P. C. c. 27, § 6; R. v. Russell, Ry. & M. 356.
‡ 1 Hawk. P. C. c. 27, § 6; Kellw. 136; Moor, 754.
§ R. v. Alison, 8 C. & P. 418; R. v. Dyson, R. & Ry. 523.

BOOKS RECEIVED.

Forensic Medicine and Toxicology. By Woodman & Tidy. Philadelphia: Lindsay & Blakiston. Toronto: Copp, Clark & Co. 1877.

Void Judicial Sales. By A. C. Freeman. St. Louis: Central Law Journal Office. 1877.

Elements of the Laws of the United States, etc. By Thos. L. Smith. Philadelphia: J. B. Lippincott & Co. 1878.

Catalogue of Law Books. R. Carswell: Toronto. 1877.

FLOTSAM AND JETSAM.

An exchange says: "The phrase 'privily and apart' is a corruption of the old English, 'privils and apert,' '*Apert*' is an obsolete word from the Latin, *aperio*, to open, and which meant then 'openly, publicly.' 'Privily and apert,' meant then 'privately and publicly. The phrase is twice used in this sense by Chaucer in his 'Wife of Bath's Tale.' At present it seems to be a redundant expression for private." The phrase as now understood may seem redundant, but as corrected it would be nonsense. It is used in describing the private examination of witnesses, or of a wife when executing a conveyance. An acknowledgement by a wife taken on a private examination, "*apert*" (openly or publicly,) from her husband, would hardly satisfy the statute, neither would it satisfy the rule upon which the statute is founded.

Here is a singular bequest by a French man; it may truly be styled 'a new way to pay old debts.' Vaugeas, the famous French grammarian, was in the receipt of several pensions, but so prodigal was he in his liberalities, that he not only always remained poor, but was rarely out of debt, and finally acquired among his intimates the *sobriquet* of *Le Hibou* from his compulsory assumption of the habits of that bird, and only venturing into the streets at night. His will contains much that is original, but the following is an especially characteristic clause. After disposing of all the little he possessed to meet the claims of his creditors, he adds: 'Still, as it may be found that even after the sale of my library and effects, these funds will not suffice to pay my debts, the only means I can think of to meet them is that my body should be sold to the surgeons on the best terms that can be obtained, and the product applied, as far as it will go, towards the liquidation of any sums it may be found I still owe; I have been of very little service to society while I lived, I shall be glad if I can thus become of any use after I am dead.' Whether the creditors accepted this well-intentioned bequest in part satisfaction of their claims is not recorded. I should have been pleased to have found that it was 'declined with thanks,' so that the poor *savant's* body might have gone in peace, instead of pieces, to its last resting-place.

In the case of *Ex parte Heminway* v. *Stevens*, 2 Lowell's Decisions, 496, the question arose as to what are the rights of the tenant of premises in respect to fixtures put in the leased premises by him, and it was held that the right of the tenant to remove such fixture is not lost by non-payment of rent and notice to quit, but only by quitting. If the landlord has prevented the removal by an attachment of the fixtures, the right is not then lost, even by leaving the premises. It was also held that a parol renewal of a lease renews whatever rights the tenant had to remove the fixtures. See, as sustaining the doctrine permitting removal, notwithstanding non-payment of rent, *Slossfield* v. *Mayor of Portsmouth*, 4 C. B. (N. S.) 129, though the point, as a general one, was not decided in that case. See, however, *Whipley* v. *Dewey*, 8 Cal. 36, and *Weeton* v. *Woodstock*, 7 M & W. 14. As to parol occupancies from year to year, or from month to month by the same tenant, it has been held that they make up, when past, but one tenancy: *Birch* v. *Wright*, 1 T. R. 380; *Rex* v. *Herstmonceaux*, 7 B. & C. 551. And the successor of a tenant, in the absence of evidence of a new and different contract with him, succeeds to the duties and rights of his predecessor. And a mere holding over of a tenancy from year to year does not affect the tenant's privilege to remove fixtures put in during during the term of his previous lease in writing, and so long as he holds under a fair claim of right, as tenant. he preserves his privilege. See *Penton* v. *Robart*, 2 East, 88; *Roffery* v. *Henderson*, 17 C. B. 574; *Heap* v. *Barton*, 12 id. 274; *Marshall* v. *Lloyd*, 2 M. & W. 450. It has been held, however, that when one accepts a written lease of the same premises, with the buildings, etc., from his landlord on the expiration of the former tenancy, he impliedly admits that the fixtures, of which he accepts a demise, belong to the landlord: *Loughran* v. *Ross*, 45 N. Y. 792; 6 Am. Rep. 173; see also *Shepard* v. *Spaulding*, 4 Metc. 416.—*Albany Law Journal.*

The knowledge of law prevailing among the English lower classes is illusterated by the folowing story: Not long ago an officer of the London school board was crossing Covent Garden market at a late hour, when he found a little fellow making his bed for the night in a fruit basket. "Would you not like to go to school and be well cared for?" asked the official. "No," replied the urchin. "But do you know that I am one of the people who are authorised to take up little boys whom I find as I find you, and take them to school?" "I know you are, old chap, if you find them in the streets, but this here is not a street. It is private property, and if you interferes with my liberty, the Duke of Bedford will be down upon you. I knows the hact as well as you."—*Ex.*

The following is an extract from the will of John Hylett Stow, proved in 1781: "I hereby direct my executors to lay out five guineas in the purchase of a picture of the viper biting the benevolent hand of the person who saved him from perishing in the snow, if the same can be bought for the money; and that they do, in memory of me, present it to ———, Esq., a King's counsel, whereby he may have frequent opportunities of contemplating on it, and by a comparison between that and his own virtue, be able to form a certain judgment which is best and most profitable, a grateful remembrance of past friendship and almost parental regard, or ingratitude and insolence. This I direct to be presented to him in lieu of a legacy of three thousand pounds I had by a former will, now revoked and burnt, left him." — *Newcastle Chronicle.*

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Trinity Term, 41st Victoria.

DURING this Term, the following gentlemen were called to the Bar:—

James Vernal Teetzel.
Lyman Davis Temple.
Alfred H. T. Marsh.
Thomas Gibbs Blackstock.
Duncan Byron McTavish.
J. Wilmot Gordon.
Erastus Blair Stone.
James Henry Madden.
John Crerar.
J. Alexander McGillivray.
Wm. Seton Gordon.
Frederick Montye Morson.
Charles Wesley Peterson.
Henry Aubrey Mackelcan.
Edward H. Tiffany.
T. Mercer Morton.
Charles Stephen Jones.
Elias Talbot Malone.
David Steele.
Philip Sanford Martin.
John Secord.
J. Melbourne Kilbourne.

The following gentlemen, members of the English Bar, were admitted and called.

Richard Willis Jameson.
Isidore F. Hellmuth.

The following gentlemen received Certificates of Fitness:

Duncan B. McTavish.
J. Alexander McGillivray.
Alfred H. Marsh.
Lyman Davis Temple.
Charles Wesley Peterson.
Peter Clark McNee.
Wm. Seton Gordon.
Charles Stayner Wallis.
Luther Kendal Murton.
John McSweyn.
Daniel Spencer McMillan.
David Steele.
Robert Shaw.
Thomas William Howard.
E. D. McMillan.
John Hind Hegler.
James Crowther, Jr.
John William Hector.
Henry Mortimer East.

And the following gentlemen were admitted into the Society as Students-at Law:

Graduates:

Walter Taylor Briggs, B.A., Trinity College.
Richardd Wornall Wilson, B.A., Victoria College.
George Beavers, B.A., Victoria College.
Edward Addison Emmett Bowes, B.A., University of Toronto.
Edward Betley Brown, B.A., University of Toronto.
Jacob Edward Lees, B.A., University of Toronto.
William Nesbitt Ponton, B.A., University of Toronto.
Paulus Æmilius Irving, B.A., Trinity College.
Alexander McBeth Sutherland, B.A., University of Toronto.

Matriculants:

Ernest Edward Kitson, University of Toronto.
James Martin Ashton, Albert College.
David Barker Stevenson Crothers, Albert College.

Junior Class:

Charles Oliver.
Arthur Virgil Lee.
Wm. Frederick Williams.
Charles Joseph Leonard.
Walter Allan Geddes.
Collin Gregor O'Brien.
Augustine Foy.
John Christie.
William Bannerman.
Patrick Sarsfield Carroll.
Alexander Armstrong Hughson.
Robert McGhee Flood.
Wm. Evans Scott.
Frank Howard King.
J. Johnston Anderson Weir.
Loftus Edwin Dancey.
Samuel E. T. English.
Edward Arthur Lancaster.
Robert Alexander Portebous.
Francis Patrick Ford.
J. Rymal Taylor.
George Taylor Ware.
Robert George Barrett.

Ordered, That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission as Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects:—

CLASSICS.

Xenophon Anabasis, B. I.; Homer, Iliad, B. I. Cicero, for the Manilian Law; Ovid, Fasti, B. I., vv. 1 300; Virgil, Æneid, B. II., vv. 1-317, Translations from English into Latin; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of quadratic equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; An examination upon "The Lady of the Lake," with special reference to Cantos v. and vi.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar. Translation of simple sentences into French prose. Corneille, Horace, Acts I. and II.

or GERMAN.

A paper on Grammar. Musæus, Stumme Liebe Schiller. Lied von der Glocke.

Candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), are required to pass a satisfactory examination in the following subjects:—

Ovid, Fasti, B. I., vv. 1-300,—or
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

A Student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk, (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

All examinations of Students-at-Law or Articled Clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

DIARY FOR NOVEMBER.

4. SUN..23*rd Sunday after Trinity.*
5. Mon ..The John A. Macdonald Ministry resigned,'73.
6. Tues..Law Society primary examination.
9. Fri. ...Prince of Wales born, 1841.
11. SUN..24*th Sunday after Trinity.* Battle of Chrysler's farm, 1813.
13. Tues..Battle of Windmill Point, 1838. 1st intermediate examination.
14. Wed..2nd intermediate examination.
15. Thur..Attorneys examination.
16. Fri. ..Examination for call. Joseph Guibord buried at Montreal, 1875.
17. Sat. ...Examination for call with honours.
18. SUN..25*th Sunday after Trinity.*
19. Mon ..Michaelmas term begins. Law Society convocation meets.
20. Tues..Law Society Convocation meets.
24. Sat. ...Law Society Convocation meets.
25. SUN..26*th Sunday after Trinity.*
27. Tues..Frontenac died at Quebec, 1698.
30. Fri. .St. Andrew's Day.

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THE
Canada Law Journal.

Toronto, November, 1877.

DEATH OF THE CHIEF JUSTICE OF APPEAL.

The Hon. William Henry Draper, C.B., died at his residence in Yorkville on the 3rd inst., in the 77th year of his age. Last month we alluded to the painful and lingering nature of his illness. The sometimes kind hand of death has released him from a life of toil, and years of occasionally acute suffering; but whilst in his last illness, he looked forward to his approaching change as a release from bodily pain, his heart was steadfastly fixed upon that sure and certain hope of the Christian, which banishes fear and robs death of its sting. His gain, however, would be our irreparable loss were it not for the monument he has left behind him, created by his honorable career, his brilliant intellect, his vast legal attainments and his devotion to the public service.

Time, however, does not now permit us to say all that we should wish in relation to this distinguished man. We therefore postpone our remarks until next issue. The daily papers have in the meantime supplied the main incidents of his eventful life.

THE gentleman who has published in our columns a number of letters on the subject of Dower, concludes the present series this month. As he has made the subject his own, we would again suggest that he should supply a want to the profession by publishing either an annotated edition of the statutes on the subject now under revision, or a treatise in a more extended form. Mr. Draper's handbook on Dower is now out of date, and we think a new work on the subject would be well received.

FUSION OF LAW AND EQUITY.

We direct attention to the letter of "Q. C.," which will be found in another place. It is the production of a gentleman of experience and ability, and represents views which are to a great extent (we refer to the principles involved, and not entirely to the attendant remarks) in unison with our own, and which are also entertained by a number of thinking men in the profession. We are glad to see the subject again coming up for discussion in our columns; and use the expression "again," for in this, as in many other matters, we may take the credit of being amongst the first who called attention to this most important matter of fusion.

The feeling that there was ground for some material change in a direction similar to that pointed out by our correspondent, gave rise to a commission which issued some years ago, and though no result followed therefrom, the feeling still remains. Combined with this, or perhaps, partly the cause of it, is a desire for completeness and rest. Whilst we admit the value of many recent enactments, there is undoubtedly a desire, amounting to a craving, to be let alone, to have done with this everlasting tinkering, amending and re-amending. Many think that before the desired haven of rest can be reached there must be uniformity as well as completeness in our judicial system.

"Q. C." makes some sweeping statements as to Chancery practitioners, but they are perfectly able to defend themselves, and we shall be glad to hear from them. Our correspondent very properly gives due credit to the early Chancellors and Mr. Mowat for their efforts to improve the Court of Chancery, and we may add without fear of contradiction, that the energy, hard work, and practical common sense of the present senior Vice-Chancellor has of late years done good service in raising his court in the public estimation. No amount of work or learning, however our correspondent argues, can accomplish that which should be done and could only be done by legislative enactment.

A full and temperate discussion of the subject cannot fail to prepare the public mind for a consideration of it upon its merits; and now, as in times past, our columns are open to any letters which would throw further light upon it.

JOHN WALPOLE WILLIS.

The *Law Times* of a recent date contains an obituary notice of John Walpole Willis, who died at his residence, in England, on the 10th September, at the age of 84. This gentleman was appointed one of the judges of the King's Bench in Upper Canada in 1827, in the same year as James Buchanan Macaulay. He was a barrister of Gray's Inn and was called to the Bar in England in 1816, practicing in the court of chancery. In 1820 he published a book of Precedents of Pleading in Equity, illustrative of Lord Redesdale's Treatise on Pleading, which was well thought of by the profession. Seven years afterwards he published a small work entitled "A Practical Treatise on the Duties and Responsibilities of Trustees." Both these books are to be seen in Osgoode Hall Library.

The name of this judge is not very familiar to the profession of this day, although he must have been a man of considerable character, as we shall presently see. None of his judgments during the brief time that he was judge here, have been preserved in the reports, there having been an interregnum in the series between Trinity Term, 8 Geo. IV. which concludes Mr. Taylor's volume, and Michaelmas Term, 10 Geo. IV. when Mr. Draper's volume began, and it was dur-

ing this period that Mr. Willis was on the Bench. There is a preface to the original edition of Mr. Taylor's Reports, which, however, refers to Mr. Willis. Speaking of the Court of King's Bench, then the only superior court in Upper Canada, the Reporter says: "The following Chief Justices have presided in it since its establishment: Chief Justices Osgood, Alcock, Elmsley, Scott, Powell—Judges, Cochrane, Thorpe, Russell, Scott, Powell, Boulton—Attorneys and Solicitors General, Scott, White, Weeks, Firth, Boulton, McDonell. The Bench is at present filled by Chief Justice the Hon. William Campbell—Judges, the Hon. Levius P. Sherwood and John Walpole Willis."

This preface is not reprinted in subsequent editions. This is a mistake. It contains much that is of historical interest to the profession. The editor takes occasion to deprecate the conjunction of the profession of barrister and attorney, and enumerates some of the disadvantages of, and objections to, that system. He tells us that the number of actual practitioners in his time was about seventy-five. He alludes to the then growing necessity for some simple court of equity, which up to that time had not been required, owing to the simple nature of transactions and absence of trusts, that fruitful parent of litigation and aggravation of spirit.

We venture to assert that a large proportion of those at present practising in our Courts never heard even of many of the early occupants of the Canadian Bench. It would be very interesting if some lover of his country and his profession would devote some spare time to a collection of reminiscences as to these old worthies of the law. We would gladly open our columns for something of the sort. It is now fifty years since Mr. Willis presided at the Court of King's Bench in "muddy little York." He outlived not only his brother judges, but all those who practiced before him. Not one of the counsel mentioned in Taylor's Reports is now living, and several of them died Chief Justices years ago, before numbers of those now at the Bar commenced their studies.

Some of the incidents in the life of Mr. Willis are referred to in Sir Francis Head's Reminiscences. He and Lady Willis are also alluded to in Dr. Scadding's Toronto of Old. Mr. Willis not only held a judicial appointment in Canada, but was for some time a colonial judge in the supreme courts of British Guiana, and New South Wales; and he was the first resident Judge of Victoria. The *Law Times* in speaking of him says: "Mr. Willis' career as a colonial judge was signalized by two remarkable episodes. Whilst acting as judge of the supreme court of Upper Canada [King's Bench] a judgment was given by him to the effect that certain political prisoners were illegally detained in custody. In consequence of this the Governor of Canada [Sir John Colborne] peremptorily dismissed Mr. Willis from the Bench. The Judge appealed to the King in Council, and it was decided that his judgment was right, and he was reinstated in his office. Afterwards Mr. Willis was sent to the West Indies to adjust compensation claims under the Slavery Emancipation Act, and held other judicial offices. When Victoria was first erected into a separate government Mr. Willis was appointed judge of the district, but in 1843, in consequence of a judgment he gave against the legality of the proceedings of the Colonial Government with regard to waste lands, Sir George Gibbs, the Governor of New South Wales, dismissed Mr. Willis from his post of judge of the supreme court. The colonists generally sided with the judge, who appealed again to the Privy Council, and again, after a protracted litigation, with success. Sir

G. Gibbs was ordered to pay damages and costs. Mr. Willis, however, did not return to Australia. He was twice married, first in 1824, to Lady Mary Isabella, eldest daughter of Thomas, eleventh Earl of Strathmore, which marriage was dissolved in 1833, following a verdict for £1,000, in a suit of Willis v. Bernard, in the Common Pleas in England. He afterwards married, in 1836, Ann Susannah Kent, daughter of the late Colonel Thomas Bund, by whom he has left a family.

SELECTIONS.

THE COURT OF STAR CHAMBER.

Few things are more intimately associated with the despotism of the times of the Tudors and the Stuarts, in the history of England, than the name and transactions of the *Star Chamber Court*. It has become a generic term to denote a system of arbitrary measures, where the forms of judicial proceedings are made the means of perpetrating acts of injustice, or of consummating schemes of oppression and wrong. And yet comparatively few, at this day, have ever taken the trouble to trace the history of this court, or to inquire why its very name has excited the odium of successive ages.

It is proposed in the following pages to attempt to sketch, as briefly as the nature of the subject admits, an outline of the history, character, and powers of this court, commencing, as it did, with no bad purposes, and, after being perverted to an instrument of despotic power through a succession of administrations, being extinguished at last as one of the acts of concession made by Charles to the demands of an injured and indignant nation.

In order to understand the history of this court, and the grounds upon which it became so odious to the English people, through its acts of cruelty and injustice, we must go back to a condition of the government whose very history is but little better than traditional.

From a very early period there were certain high officers in the State, and men of influence and power, who were called upon by the king to act as his council or advisers in matters of government. One of these bodies, which seems to have stood in more confidential relation to the crown than the others, was known as the Privy Council, including a portion, if not all, of the peers of the realm, with the Chancellor and other civil and judicial officers of the State. The king being considered the fountain of justice, it was a common thing for persons who felt themselves aggrieved by others to apply to him for redress by way of petition. In this way matters of judicial inquiry, as well as those of royal discretion, came to be submitted to the action of this council, and a jurisdiction was thus exercised which properly belonged to the courts of justice only.

The forms of proceeding in such cases were such as were in use in the Court of Chancery, the Chancellor being the principal officer in the council, and questions were determined without the intervention of a jury. In this, however, the sense of the people was disregarded, if not actually outraged, since trial by jury was one of those traditional rights to which they resolutely clung through all the changes in their government. Attempts were accordingly made, from time to time, to retain the administration of justice within the known and defined channels of the common law and the principles of Magna Charta. In the 25th of Edw. III., an act of Parliament, which, among other things, defined the crime of treason, forbade that any should "be taken by petition or suggestion to the king or his council, unless it be by indictment or presentment, or by writ original at the common law; nor shall be put out of his franchise or freehold, unless he be duly put to answer, and forejudged of the same by due course of law." But in the unsettled state of the government, and the inability of the people to contend against combinations of men in power, these efforts to restrain the exercise of judicial functions by the Privy Council not only proved unavailing, but it was deemed politic to clothe them with greater and more defined powers under a somewhat modified form of organization.

The reason for this, and for departing so far from the genius and prevailing spirit of the common law, as to create an irresponsible court with such powers, in which the common-law forms of proceedings, and above all the right of trial by jury, were discarded, is to be sought in

the troubled state of the times, and the undue preponderance which factions and unprincipled nobles and men in power were able to bring to bear upon the administration of justice. There were early laws against champerty and maintenance through unlawful combinations to obstruct the course of justice and deprive suitors in court of their rights by corruption or intimidation, but these were openly violated with impunity. Men dared not to pursue their rights in the ordinary courts of justice. The security of a juror's oath was denied them, in the unblushing manner in which bribes and threats were resorted to by such as had power and influence over the proceedings of these courts. Coke, speaking of this court and the reason of its creation, says: "Seeing the proceeding according to the laws and customs of this realm cannot by one rule of law suffice to punish in every case the exorbitancy and enormity of some great and horrible crimes and offences, and especially of great men, this court dealeth with them, to the end that the medicine may be according to the disease, and the punishment according to the offence; *ut pœna ad paucos, metus ad omnes perveniat*, without respect of persons, be they publick or private, great or small."

To reach a mischief which had grown so intolerable, and to cope with the power and influence of the offenders in high places, with whom it was necessary to contend, a court was created by the act of 3 Henry VII. (about A.D. 1500), made up of the highest officers in the kingdom, embracing theoretically the king himself, who was deemed to be the fountain of justice, to which was confided almost unlimited power and discretion over a large and undefined class of offences of a public, and many of them of a political character, without the check of a jury, and subject to no revision by way of appeal. It was, however, rather the grafting of new powers upon those before exercised by the Privy Council, than the creation of a new court. It was not, in terms, designated the Star Chamber, nor was it spoken of under that name in any act of Parliament until the 19 Henry VII. The preamble of the act creating this court recites, among the causes for such a measure, the combinations which had been formed for the obstruction of justice, the partiality of sheriffs in making panels, and in untrue returns, the taking money by jurors, and the great riots and unlawful assemblies which served to defeat the fair administration of justice. It then proceeds to name the Lord Chancellor, the Treasurer, the Keeper of the Privy Seal, or any two of them, with a bishop and temporal lord of the council, and the Chief Justices of the King's Bench and Common Pleas, or two other justices in their absence; and empowers them to call before them such as offended in the foregoing respects, and to punish them, after examination, in such manner as if they had been convicted by course of law.

A court thus constituted, with powers so broad, and a discretion unlimited by prescribed rules, though called into existence for wise and salutary purposes, was, in the end, like the evoking the spirit of mischief without a corresponding power in reserve to lay it, or check its excesses if inclined to abuse its authority. Instead, therefore, of its power becoming weaker, as the occasion which called it into being passed away, it continued to draw to itself new elements of strength, while it enlarged the extent of its jurisdiction and the sphere of its action. It is not easy at this day to trace the steps through which it attained the summit of its power, though it is not difficult to understand how it could be made a most potent engine of despotic rule and bigoted intolerance in the hands of ambitious leaders and unscrupulous prelates, such as flourished during the reigns of Henry VIII., Elizabeth, and the first two Stuarts. In the 21st of Henry VII., the President of the Council was added to this court, showing that hitherto the two bodies had been kept distinct in their action. It underwent changes during the administration of Wolsey, and in the time of James, we are told, all the peers had acquired a right somehow to sit as members of this court; and Barrington states the number of its judges at from twenty-six to forty-two. Sir Thomas Smith also states that Cardinal Wolsey greatly extended its powers, in order to curb some of the nobility in the north of England, and that in his time those who were prosecuted in this court were generally too *stout* for the ordinary course of justice. It was not, however, a court of exclusively criminal jurisdiction, though it was chiefly in the exercise of its criminal powers that it has come down in

history to the present day. The Lord Chancellor usually presided at its meetings, though instances occurred, especially during the reign of James, when the king himself sat and presided at the trials of cases.

One of the strangest circumstances that gave to the crown a hold and control over the action of this court was, that all its principal officers received their appointment and held their place by the power of the king, while the odium of an unjust judgment before the public was divided among a large and numerous body of judges. Nor were the proceedings of the court so far public as to render the action of any particular member obnoxious to public censure.

The mode of its proceedings, moreover, was particularly well adapted to the purposes of injustice and unfair advantage. One of the most important rights secured to an Englishman by the common law was, that he should not be obliged to accuse himself in a court of justice, if charged with the commission of a crime. Torture, which was in its very nature repugnant to the spirit of the common law, and only to a limited extent obtained a place in the administration of justice in England, was often resorted to to compel confession in the courts of the Continent. But, in utter violation of this cherished right, the Star Chamber required the party charged with an offence to answer fully in relation to the same, upon oath, to interrogatories the most searching and inquisitorial. In the account which we have of the prosecution of Lilburne, a famous Puritan in the time of Charles I., the proceedings seem to have commenced with interrogatories designed to extort from him a confession of the very matters upon which they intended to found the charges upon which he was to be tried. When called before this body, though but a young man, hardly twenty years of age, he was set upon by all manner of threats and suggestions by the various members of the court, to induce him to submit to the oath. He resolutely refused to answer; and was whipped, branded, and committed to close prison, and denied all access to his friends, upon the ground that, by such refusal, he had been guilty of a *contempt* of court.

We may have occasion to recur to this case again, and have referred to it here as illustrating this part of the mode of prosecuting offenders in this court. Another objectionable feature in its mode of investigating causes was in the form of examining witnesses. In carrying out the spirit of trial by jury, all proceedings are in open court, including the examination of witnesses in the presence of the parties and of the jurors, who are to weigh the degree of credit to which they are entitled. Every one familiar at all with the trial of causes knows how vastly superior in eliciting the truth is such an oral examination of witnesses in the presence of the court to an *ex parte* one taken in the form of depositions. And yet the latter was the mode in which all evidence was taken which was submitted to this court. Indeed, so open is such a course of proceeding to censure and reproach, that a writer who was himself a practitioner in this court, and sufficiently disposed to eulogize it wherever it could claim any advantage or superiority over others, remarks: "Now, concerning the persons of witnesses examined in court, it is a great imputation to our English courts that witnesses are privately produced, and how base or simple soever they be, although they be tested *diabolases*, yet they make a good sound, being read out of paper, as the best. Yea, though a lewd and beggarly fellow take upon him the name and person of an honest man, and he be privately examined, this may be easily overpassed, and not easily found out." This obvious violation of the first principle of justice seems to have been tolerated to its full extent for more than a hundred years, when Lord Ellesmere, as chancellor, passed an order by which every witness who was to be examined in court was to be *showed* to the attorney of the other side, and his name and place of abode delivered, to the end that he might be known to be the person, and that the other side might examine him if he pleased. But he might not, at any time, examine as to the *credit* of the witnesses offered against him, or notify the court what their condition was as to credibility; "for that causes being for the king, if witnesses' lives should be so ripped up, no man would willingly be produced to testify." And so far was this principle carried in favor of the crown, that it was held by "many of the circuits of judges," that "a witness for the king, upon an indictment, shall not be questioned for perjury; yea, this court hath

ordered a great reward to witnesses in this court, by yielding their testimonies for the king;" or, in other words, one of the usual modes of corrupting the fountains of justice in this court was by means of hired informers, who might commit perjury with impunity.

The tendency of a court thus constituted, and thus irresponsible, was to extend its jurisdiction and arrogate to itself new powers; and so far was this practically carried, that it was difficult to draw any line short of crimes that were capital, which limited the class or character of offences against the power or prerogative of the government. of which this court did not take cognizance. Nor would it allow any one to question its authority. By the rules of the court, it seems, whoever was charged with an offence was required to put in an answer to the information against him in writing, signed by two counsel; and, unless this rule was complied with, it was deemed to be a confession of the charge, although the defendant was himself in court, and orally denied his guilt. Thus in the case of the famous Prynne, whose treatment in this court will be further noticed, he offered his answer signed by one of his counsel, and applied to the court to have it allowed, with the addition of his own signature, on the ground that his other counsel was afraid to sign it, lest he might thereby incur the censures of the court. But he was denied this privilege, and, for contempt in not filing his reply signed by both his counsel, the information was taken *pro confesso*, and the court proceeded to pass sentence upon him accordingly. It has been the pride and glory of the profession in courts of common law, that, with rare exceptions, counsel have been found willing and bold enough to stand by a party charged with an offence, and to sustain his rights, even against the insolence of power or the exasperated passions of the populace, wherever the right of employing counsel has been recognized by law. Curran's memory is indelibly associated with the bold and eloquent defence of the Irish patriots, and the trial of the British soldiers for the part they took in the so-called "Boston massacre," in 1770, is a memorable influence of the power of argument and persuasion on the part of legal counsel in successfully maintaining the cause of justice against the clamor of the public and the passions of a jury.

There were, as has already been stated, counsel admitted to practice in the Star Chamber, and without their aid, it would seem from the cases reported, a party could not be heard even in his own defence. But the seeming advantage which was thus accorded to the accused, was, at times, more than neutralized by the acts of intimidation by which the court suppressed every thing like a free exercise of this privilege of counsel. Thus it is stated that in Prynne's case, who was complained of in connection with two others, his counsel, Mr. Holt, prepared his answer, but refused to sign it, "saying he had an express order to the contrary." He did, however, sign the answer of one of the parties accused, and, upon its being alleged that it was "*scandalous*," it was referred to the two Chief Justices, Brampton and Finch, when Finch "reviled Holt exceedingly, and told him he ought to have his gown pulled over his ears for drawing it," although, in fact, "it was only a confession or explanation of the charge in the bill, and a recital of acts of Parliament."

This, however, was but in keeping with the general course of dealing of this court with any one who presumed to question their power, or throw obstacles in the way of accomplishing their purposes. Thus we have three instances reported of counsel questioning the jurisdiction of this court, by insisting by way of *demurrer*, as it was called, that the matter upon which they were assuming to act was not within the subject-matter delegated to them by the act of Henry VII. One of these was the case of Mr. Plowden, whose age and standing probably sheltered him from any thing more than a refusal to consider the objection. In another, the counsel was pardoned on account of his youth and inexperience. But in the third, the Sergeant was sharply rebuked by the court for such a flagrant violation of the dignity of the court, as to question the extent of its power. The case of Fuller is still more remarkable. He was a bencher of Gray's Inn, and was employed to sue out a writ of *habeas corpus* to test the validity of a warrant from the High Commission court, by which two Puritans were imprisoned for refusing to take a

certain oath. For this he was, at Bancroft's instigation, imprisoned by the Star Chamber, and lay in jail till his death. Whitelock, a barrister, and afterwards a judge, having given a private opinion to a client, that a certain commission issued by the crown was illegal, was brought before this court for contempt and slandering the king's prerogative, and was only let off upon making a humble submission.

Such, in general terms, were the constitution and powers of this famous court; and, when we come to examine its proceedings in particular cases, we shall find that they were such as might naturally be expected under a corrupt and despotic government, from judges acting directly under the eye of the monarch. But, before considering these, it is proper to say a few words upon the *name* of the court itself. A great deal has been written upon this subject, and writers are, to this day, divided upon the question. The more commonly received notion has been, what is probably true, that it took its name from the chamber in which its sittings were held, the ceiling of which, it is said, was ornamented with stars. Hence the name *camera stellata*. Blackstone, however, states that there were no stars remaining there in the time of Elizabeth. Others have found the origin of the term in the fact that, by a law prior to Edward I., the contracts of the Jews, called "*starrs*," were deposited in the exchequer of the king, in Westminster, in chests or boxes, in the chamber or apartment in which this court used to assemble. Others trace it to the Saxon word *steran*, to steer or rule, "as doth the pilot," in the words of Coke, "because this court doth steer and govern the ship of the commonwealth." Others still applied the term because the chamber was full of windows; and the kind of crimes, *stellianata*, of which the court had cognizance, supplied to others the etymology of the name.

There is nothing in these speculations to violate probabilities or offend good taste. But the awe with which some writers contemplated this court, and the base and truckling spirit with which they treat even of its name, can hardly be read, in the light of history, without positive disgust. Hudson, of Gray's Inn, who was a practitioner in this court, wrote quite an extended treatise upon its powers and duties, in the time of James I. In speculating upon its name, he remarks, in language which a school-boy now would know better than to adopt: "Stars have no light but what is cast upon them from the sun by reflection, being his representative body." "So in the presence of his great majesty, the which is the sun of honor and glory, the shining of those stars is put out, they not having any power to pronounce any sentence in this court, for the judgment is the king's only; but, by way of advice, they deliver their opinions, which his wisdom alloweth or disalloweth, increaseth or moderateth, at his royal pleasure." And he gives an instance, by the way of illustration of this, where the king, "during the dignity of that court, sat five continual days in a chair of state elevated above the table, about which his lords sat, and after that long and patient hearing, and the opinions, particularly given by his great council, he pronounced a sentence more accurately eloquent, judiciously grave, and honorably just, to the satisfaction of all hearers and all the lovers of justice, than all the records extant in this kingdom can declare to have been, at any former time, by any of his royal progenitors."

The fulsome flattery of this fanciful etymology of the name of this court is quite equalled by another writer, whose work, West's *Symboleography*, was published in the same reign, about the time of the settlement of this court: "The dignity of this court is such and so great as no other kingdom hath ever created the like, being without pair or equal." He refers to the hours of the day when its sittings are held, ordinarily from nine to eleven o'clock, and speaks also of the windows and stars in the roof as giving rise to its name, and then adds: "Yet, emblematically, they resemble the body of the judges of that court, consisting of persons of great eminence, being the principal men of the two great estates of this kingdom, the lords spiritual and temporal, the head of which bodie is our sovereign lord the king, who, when he pleaseth, sitteth there in his own person. But in his absence these judges doe censure and determine all causes there depending, by majority of voices, deriving their light and authority from his majesty, as the stars from the sun." Nonsense like this

might be tolerated from men who knew no better, or had had their common sense blinded by the use of language by others. But this cannot be said of Lord Coke, who knew how, sometimes, to lay aside his sycophancy, though he did not at others hesitate, as in the case of Sir Walter Raleigh, to play the bully and the blackguard in office, if obsequiousness to royalty dictated such a *role*. His language is: "It is the most honorable court, our parliament excepted, there is in the Christian world, both in respect of the judges of the court and of the honorable proceeding according to their jurisdiction, and the ancient and just order of the court." "And it is truly said, 'Curia camerse stellatæ, si vetustatem spectemus, est antiquissima, si dignitatem honoratissima.' This court, the right institution and ancient orders thereof being observed, doth keep all England in quiet."

The discretionary power of this court, in the matter of punishment, made it, moreover, a most dreadful engine of iniquity and cruel injustice in the hands of unscrupulous men. Instances of this disgrace the history of its administration, especially under the first two Stuarts, James I. and Charles I. It could not, it is true, inflict capital punishments, but it could do worse, by robbing, maiming, torturing, and disgracing its victims. Thus it is stated, in general terms, by the writer already quoted, "In this sentence the court doth punish the offender and relieveth the oppressed. The punishment is by fine, imprisonment, loss of ears, or nailing to the pillory, slitting the nose, branding the forehead, whipping of late days, wearing of papers in public places, or any punishment but death." "Loss of ears was inflicted upon perjured persons, infamous libellers, *scandalors* of the State, and such like." "Branding in the forehead and slitting of the nose was a punishment inflicted upon forgers of false deeds, conspirators to take away the life of innocents, false scandal upon the judges and first personages of the realm." "Wearing papers hath been in all ages, and before the statute of 5 Elizabeth was, the usual punishment of perjury, but since hath been used as a punishment for oppressors and great deceits." "Sometimes the punishment is, by the wisdom of the court, *invented* in some new manner, for new offences, as for Trask, who raised Judaism up from death, and forbade the eating of swine's flesh. He was sentenced to be fed with swine's flesh when he was in prison." "And so tender the court is of upholding the honor of the sentence, as they will punish those which speak against it with severity, as they did Finch and Partridge, for certifying his majesty upon a petition matter which crossed the sentence of the court in the case of one Herlakenden." And it is gravely stated by Barrington, that, during the reign of Charles I., the fines inflicted by this court were so enormous, that the audience gathered around the court room at three o'clock in the morning, in order to secure places to hear the proceedings, as men gather around the table where play is the deepest.

Some of these sentences are collected in Hume's and Hallam's histories, and full reports of the proceedings of the court may be found in the volumes of State Trials, with which many besides lawyers are familiar. We select a few for purposes of illustration. Sir David Foulis was fined £5,000, chiefly because he had dissuaded a friend from compounding with the commissioners of knighthood. Sir Anthony Roper was fined £4,000 for violating a law made in the time of Henry VII., against converting arable land to pasture, and this as late as the time of Charles I. Morley, for reviling, challenging, and striking Sir George Theobald, one of the king's servants, in the court of Whitehall, was fined £10,000. A citizen, when shown a swan in the crest of a man of quality, saying he did not trouble himself about that *goose*, was fined by this court for the offence, and reduced to beggary. Richard Grenville said of the Earl of Suffolk, with whom he had had difficulty, that he was "a base lord," and was condemned to pay a fine of £8,000 for such a slander. Ray, for exporting some fuller's-earth, was set in the pillory and fined £2,000. One of the most remarkable cases was that of Bishop Williams, who had been lord-keeper of the seal, a popular prelate, a man of learning and spirit, and, at one time, a special favorite of James. While enjoying this patronage, he exerted his influence in favor of Laud, afterwards archbishop, who owed his first promotion to his good offices. Some disagreement having arisen between them, nothing

could appease the vindictive spirit of the haughty archbishop but the ruin of the man to whom he owed his elevation. For some frivolous pretence he was brought before the Star Chamber, and fined £10,000, committed to the Tower during the king's pleasure, and suspended from office. In order to levy this fine, the officers seized the furniture and books of the palace of Bishop Williams, and found there, among some refuse papers, some letters from one Osbaldiston, a schoolmaster, directed to the bishop. In these the writer spoke of a *little great man*, and in one place of a *little urchin*. As Laud was diminutive in stature, it was conjectured that these expressions referred to him; whereupon the bishop was tried for receiving such scandalous letters, though he had never shown them to any one, and Osbaldiston for writing them; and the first was fined £8,000, and the other sentenced to pay a fine of £5,000, and to have his ears nailed to the pillory in sight of his own school.

These will suffice to show the nature of the offences of which this court took cognizance, and the character of the punishments which it imposed. The cases of Prynne and Lilburne, already mentioned, will serve to show the spirit and character which pervaded the proceedings, by which the court accomplished its purposes. Both these trials took place in the time of Charles. The Puritans had already obtained a strong foothold in England, and were making themselves felt, by their bold advocacy of civil as well as religious liberty. Whoever, therefore, was in any manner identified with this odious sect, was particularly obnoxious to the vengeance of the Star Chamber. Among the peculiarities of the Puritans was a strict observance of the Sabbath, as well as aversion to stage plays and profane sports generally. To counteract this spirit, the clergy were required by proclamation to read what was called "the Book of Sports" in their churches, by which certain sports and pastimes were to be used by the people on Sundays, after the evening service. Add to this, that Charles and his queen at times were present at the exhibition of stage plays, and that she at times took part herself in masques and other like exhibitions at court.

In this state of public feeling, Prynne, who was a barrister-at-law of Lincoln's Inn, and a Puritan of the straitest sect, published his famous *Histrio Mastyx*, a huge volume of a thousand quarto pages, aimed at stage plays, music, dancing, public festivals, Christmas sports, bonfires, and May-poles. For this "libellous volume" he was arraigned before the Star Chamber. What made it a little more remarkable, he had been licensed by Abbott, Laud's predecessor, as Archbishop of Canterbury, to publish a considerable part of this work. In his address to the court, Mr. Noy, the Attorney-General, states several of the offensive parts of this work, and among other things states what it attacks: "witchery, church ceremonies, &c., indistinctly he falleth upon them; then upon altars, images, hair men and women, bishops and bonfires, cards and tables, do offend him, and perukes do fall within the compass of his themes." The trial occupied three days, and the fourth was consumed in pronouncing sentence against him. Among his judges was Richardson, the Chief Justice of the King's Bench, who began with this significant language: "Since I have had the honor to attend this court, writing and printing of books have been exceedingly found fault withal, and have received sharp censure, and it doth grow every day worse and worse; every man taketh upon him to understand what he conceiveth, and thinks he is nobody except he be in print. We are troubled here with a book,—a monster,—*monstrum horrendum, inform, ingens!*" &c. "I would to God in heaven the devil and all else that had their heads and hands therein, besides Mr. Prynne, were, &c.; for I think they are all ill willers to the State, and deserve severe punishment as well as Mr. Prynne doth." "For the book, I do hold it a most scandalous, infamous libel to the king's majesty, a most pious and religious king; to the queen's majesty, a most excellent and gracious queen,—such a one as this kingdom never enjoyed the like, and I think the earth never had a better." "I say, eye never saw nor ear ever heard of such a scandalous and seditious thing as this misshapen monster is." He then proceeds to read sundry extracts from the book, drawing from them inferences the most forced and unnatural. Thus, in his general sweep for historical illustrations

of the mischief of frequenting stage plays, Mr. Prynne had referred to Nero, and spoke of Flavius and others conspiring to murder him for the influence of his "lewd example" upon the magistrates and people. The Chief Justice concludes from this that the author intends to instigate the people to murder the king. "If subjects have an ill prince, marry, what is the remedy? They must pray to God to forgive him, and not say they are worthy subjects that do kill him." He at last addressed the prisoner: "Mr. Prynne, I must now come to my sentence, though I am very sorry, for I have known you long, yet now I utterly forsake you." The Earl of Dorset, another of the court, was even more abusive. It is not, therefore, to be wondered at, that, in the exercise of their unlimited power, poor Prynne was made to feel the full measure of their indignation. He was deprived of his right to practice as a barrister; condemned to stand in the pillory at Westminster and in Cheapside; to lose his ears,—one at one of these places, and the other at the other; to pay a fine of £5,000; and to be imprisoned during life. Dorset wished to add branding in the forehead, or slitting his nose, and to have his fine £10,000 instead of £5,000.

But a man of Prynne's temperament and nerve was not to be silenced by mere corporal punishment, and some four years afterwards we find him again before this court, for publishing what they chose to call libels. It was at this time he was condemned unheard, as has been before stated, because he could not find counsel bold enough to sign his answer to the information against him. Upon his being placed at the bar to receive his sentence, Finch, the Chief Justice, looking carefully at him, remarked that he thought Mr. Prynne had no ears, but it seemed to him he had. The usher of the court was ordered to raise his hair and show his ears, when the lords were angry to find that only a part of them had been cut off, to which Prynne wittily replied: "There was never one of their honors but would be sorry to have his ears as his were." Laud was particularly bitter and severe in pronouncing sentence. The books alleged to be libellous were religious works, and fell under the Archbishop's special censure; and the sentence pronounced upon him was that he should pay a fine of £5,000, stand in the pillory, lose the remaining part of his ears, be branded "S. L." on each cheek, and be perpetually imprisoned in what he calls a "nasty dog-hole," at Carnarvon Castle in Wales. All of which was rigidly inflicted until the revolution, which deprived these prelates of their power.

The case of Lilburne was equally cruel and outrageous with that of Prynne, though, from the temperament of the man and the almost eagerness with which he courted martyrdom, we are not apt to regard it with the sense of indignation that we feel in reading that of Prynne. Lilburne was a young man, only twenty years old, when arraigned for being concerned in printing and publishing certain controversial works upon the Litany and other like subjects alleged to be seditious. He was put to the bar with an old man eighty-five years of age, charged with the same offence. As they refused to take the oath when interrogated by the court, they were for this both sentenced to pay a fine and stand in the pillory; and he, being a young man, to be whipped through the streets from the Fleet prison unto the pillory, wherever the court should erect that. He was kept in prison from February to April, when he was placed in a cart, stripped, and whipped with a treble-corded whip, all the way from the Fleet to Westminster, where the pillory was placed, at least five hundred strokes in all. The tipstaff of the Star Chamber was then sent to know if he would acknowledge his fault. This he refused to do, although by so doing he would have saved standing in the pillory. He was accordingly placed in this, and remained there two hours, with head uncovered, in a hot sun, his back dreadfully lacerated by the blows he had received; and he improved the occasion by addressing the people around him, and scattering pamphlets amongst them. After continuing this at a great length, he says: "There came a fat lawyer,—I do not know his name,—and commanded me to hold my peace and leave my preaching." This, of course, he refused to do, and went on with his discourse to the people. After continuing this a while, the warden of the Fleet came with the same fat lawyer, and commanded him to hold his peace. But he refusing again, they gagged him, and kept him an hour and a

half in that condition, but in no measure subdued or disposed to compromise, but, on the contrary, manifested his feelings by stamping and gesticulations. The Star Chamber then, in order to subdue him, ordered him to be shut up in solitary confinement, with irons on his hands and legs, in the wards of the Fleet, where the basest and meanest sort of prisoners were placed. Here a severe fever seized him; but no physician was permitted to visit him till late the next day, even to dress his wounds. His sickness continued for six months, during which he was still kept in close prison; and, as soon as able to bear them, was again put in irons, and denied any communication with his friends, suffering every indignity the court could inflict upon him. After enduring this for nearly three years, he petitioned Parliament, and was liberated, and became a lieutenant-colonel in the parliamentary army. It will be recollected that this was not in pursuance of a sentence for any crime, since he had never been called to answer to any charge, but for simply refusing to answer interrogatories tending to criminate himself, and that under oath. It was, moreover, "commanded to be executed," in the words of the narrator, "by an eminent court of justice professing Christianity *pessima est injustitia, quæ sit sub colore justitiæ.*"

Want of space forbids extending this account or that of Mr. Prynne, and we have only room to add that the ridding of the body politic of such a plague-spot as this infamous tribunal had grown to be, was one of the early acts of the Long Parliament, so famed in the history of England. A bill for abolishing this court was moved by Lord Andover in the House of Lords, March 5, 1641. It contains a long preamble, referring to the Magna Charta, the act of Edward III., already mentioned, and sundry other acts designed to secure to parties charged with crimes a full and fair trial, together with the act of 3 Henry VII., creating the officers of this court, and recites: "But the said judges have not kept themselves to the points limited by said statute, but have undertaken to punish where no law doth warrant, and to make decrees for things having no such authority, and to inflict heavier punishments than by any law is warranted;" and forasmuch, among other things, as "the proceedings, censures, and decrees of that court have, by experience, been found to be an intolerable burden to the subjects, and the means to introduce an arbitrary power and government," it proceeds to declare that the Court of Star Chamber should be clearly and absolutely dissolved from the 1st August, 1641, and all power and authority thereof absolutely revoked and made void. Almost concurrent with this was an act repealing the Court of High Commission, and one declaring the proceedings touching ship-money void, for which Hampden had suffered.

An English writer, Carr, has embodied this act abolishing the Star Chamber with the Magna Charta, the Act of Treasons of 25 Edward III., the Habeas Corpus, and some other acts of a like character, in what he calls "English Liberties;" and, in commenting upon this act, remarks: "Whatever pretences there were for setting this court at first, 'tis certain it was made use of as a property of arbitrary power, to crush any whom the ruling minister and favorites had a mind to destroy." It violated, as he maintains, the English Constitution in three things: 1st, In proceeding without a jury; 2nd, in examining men upon oath touching crimes by them supposed to be committed, whereas no man is bound to accuse himself; and, 3rd, the judges proceeded by no known rule or law, but acted arbitrarily, according to their own pleasure.

This summary, it will be perceived, justifies every thing which has been said of the character of this court in the preceding pages; and, in view of its history, one can hardly forbear indulging a reflection upon the aims and functions of the common law, as compared with any other system known to modern civilization, and how unsafe it is for a people who have once enjoyed its safeguards and protection to exchange these for any other form of justice, however plausible it may appear, or however seemingly recommended by present expediency. The same men who, as judges of the common law, while surrounded by the checks and limitations which usage and tradition had gathered within the precincts of their courts, had conducted themselves in a manner to escape censure or odium, removing thence into the murky and corrupted air of the Star Chamber, were the first to violate

the fundamental principles of the common law, and were ready to go the farthest in discarding its salutary and time-honored rules. Of all the systems and schemes devised by the wisdom of man for administering justice, there is none, take it all in all, which comes so near perfection as that of the common law, made up of two elements,—judges and jurors,—in a measure independent, and each with its proper function prescribed and understood. That, like all human institutions, it is true, is imperfect and defective, and sometimes not only fails to attain justice, but becomes an instrument of positive wrong. But these are the exceptions. The rule is in every respect in favor of reaching results as near the ends of justice as can reasonably be hoped for in the uncertainty of human testimony, and the difficulty there is in defining and limiting the rules of law, And when, in view of some verdict rendered through the passion or ignorance of a jury, we hear men declaiming against these as a part of our system for determining questions of right in courts of justice, we would only point to them the danger to which suitors would be subjected from narrow, partial, or misguided views of men with like passions, who would undertake to pass upon the rights of others under the name of judges. Especially is this the case where judges are elective. We should, by confiding to these men, without the check of a juror's oath, the rights of the citizen, be going back a great step towards the mischiefs of a Star Chamber, where the law between man and man, and especially between the individual and the public, can hardly fail to be moulded and shaped to suit the will and passions of the power that creates the judges who declare it. No tyranny is more cruel, no injustice more intolerable, than that which is accomplished under the name of administering justice through the medium of a court of law. The lessons left us in the history of the Star Chamber should not be lost upon the world; and if this effort to revive the memory of this court, by borrowing from the records of the past, shall have served to throw light upon its true character in the mind of any one, the labor would not have been in vain.—*American Law Review.*

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

KIRKPATRICK V. HARPER.

Notice to proceed—Nullity—Irregularity—Laches—Waiver—Judgment—Writs of fi. fa., setting aside.

When in a notice to proceed one of the plaintiffs' named was omitted,

Held, (notwithstanding *Doe Read* v. *Paterson*, 1 Prac. R. 45), under the present state of the law, not a nullity, but merely an irregularity, and that such irregularity had been waived by the defendant's laches, he having taken no objection until over a year afterwards.

Held, also, that the writs of *fieri facias* should be set aside, the words "executors of the last will and testament of J. K., deceased," having been unauthorisedly struck out after the issuing of the writs.

[October 4.—MR. DALTON.]

In this case the defendants having given the plaintiffs notice to proceed, and they not prosecuting the suit, the defendants entered a suggestion of the notice, signed judgment and issued execution. The plaintiffs took out a summons to set aside the suggestion and judgment, on the ground that the notice to proceed was a nullity, one of the plaintiffs' names having been omitted in the style of the cause; and to set aside the writs on the ground that an alteration in the writs had been made after their issue by striking out the words "executors of the last will and testament of J. K., deceased."

Osler, for defendant, contended that the notice to proceed was only irregular.

Holman for plaintiff cited: *Doe Read* v. *Paterson*, 1 Prac. R. 45, and contended that the notice to proceed was a nullity, and that the judgment must therefore be set aside.

MR. DALTON held that the notice to proceed, owing to the recent changes in the law as to amendments, was not a nullity but only an irregularity, which the defendants had waived by their laches, more than a year having elapsed between the service thereof and this application. The writs he thought, however, should be set aside. He therefore made the summons absolute to set aside the writs of execution with costs as to that part of the application, but discharged it as to setting aside the judgment for irregularity. He however set aside the suggestion and judgment on the merits on the payment of the costs of the application so far as it applied to this, and the costs of the judgment.

CRAIG V. CRAIG.

Execution—Abandonment—Interpleader—Landlord—Distress.

A sheriff made a seizure on certain goods in the middle of September, but put no bailiff in possession, merely taking the word of the execution debtor that the goods would not be removed, and the goods were distrained for rent on Oct. 2nd. The sheriff thereupon took the goods out of the landlord's hand under pretence of the execution.

Held, that there had been an abandonment by the sheriff as against the distress warrant.

When goods are under seizure for rent they are *in custodia legis*, and the sheriff has no right to seize them under an execution.

On an application by a sheriff for an interpleader order under such circumstances, the landlord's claim being taken to be *bona fide*, the legality of the seizure under the distress cannot be enquired into in chambers, and the sheriff's application for relief by interpleader was therefore refused.

[October 18.—MR. DALTON.]

This was an application by a sheriff for an interpleader order under the following circumstances: The sheriff seized the goods in question about the middle of September, but put no bailiff in possession, merely taking the word of the execution debtor that he would not remove the goods. Rent became due on 1st October when the goods were removed off the premises. On October 2nd, the landlord seized the goods for rent on the ground that this removal was fraudulent within the meaning of the statute On Oct. 3rd the sheriff made a second seizure while the goods were in possession of the landlord's bailiff. The landlord notified the sheriff that he claimed the goods under distress for rent. The sheriff thereupon applied for an interpleader. Affidavits were filed both by the claimant and the execution creditor as to whether or not the removal was fraudulent.

Black, for execution creditor.

O'Brien, for landlord, cited Impey, 4th ed. 105, 110—11; *Castle* v. *Ruttan*, 4 C.P. 252; *Hart* v. *Reynolds*, 13 C. P. 501; *Robertson* v. *Fortune*, 9 C. P. 427; *Wheeler* v. *Murphy* 1, Prac. R. 336.

Osler, for sheriff, cited: *Ackland* v. *Paynter*, 8 Price 95; *Hamilton* v. *Bouck*, 5 O. S., 664. Interpleader Act, 1865.

MR. DALTON thought that (1) under the circumstances the first seizure by the sheriff must be considered to have been abandoned; (2) that the goods being under seizure for rent they were *in custodia legis* and the sheriff had no right to seize them under an execution, and (3) that the question of the validity of the landlord's claim could not be discussed in chambers. The summons was therefore discharged with costs, except as to the costs incurred in respect to the question of fraudulent removal, which were held to have been incurred unnecessarily.

SQUIRE V. DREENAN.

Pleading—Estoppel—Judgment.

When in an action on a promissory note against an endorser the defendant pleaded in estoppel that the note was given as security for the performance of a certain agreement between the plaintiff and one M., that the defendant endorsed as security for M. the maker, and that the plaintiff had brought an action against M. on the agreement, in which action M. had pleaded *non assumpsit* and had judgment on the plea.

Held, that the plea was no answer to the declaration.

[October 18.—MR. DALTON.]

This was an application to strike out a plea, pleaded in terms as above, as being framed to prejudice, embarrass, and delay the plaintiff.

Spencer, for plaintiff. The judgment in the former action is not an estoppel to the plaintiff suing in this action, the parties not being the same and the causes of action not being identical. See DeColyar on Guarantees, pp. 26, 27; *Drake* v. *Mitchell*, 3 East, 251; *Nelson* v. *Couch*, 15 C. B. N. S. 99; *Carter* v. *James*, 13 M. & W., 137.

Osler, for defendant. Plaintiff should have demurred, and should not have moved to strike out the plea. The plaintiffs do not allege that the plea is embarrassing.

MR. DALTON thought that the plea was no answer to the declaration and that it should be struck out.

Order accordingly.

CHANCERY CHAMBERS.

(Reported for the *Law Journal* by H. T. BECK, M.A., Student-at-Law.)

ROWE V. WERT.

Appeal from Master—Report—"Special circumstances"—Delay—Mortgage—Dower.

On an application for leave to appeal from a master's report after the time limited, leave was not granted where there had been a delay of some six months, and no explanation offered.

When a bill was filed by a first mortgagor for a sale of the mortgaged premises, there being also a second mortgage, the mortgagor's wife having barred her dower in the first mortgage, but not in the second mortgage and the master, on a warrant being taken out after the sale for the purpose of taking accounts, in his report thereon, found the widow entitled to dower as against the second mortgagee.

Held, That under G. O. 220, the master had power in his final report to entertain the question of dower, and report thereon as a "special circumstance," and that

the second mortgagee was not entitled to notice that this point would be considered in settling the report.

Held, Also, that under the above circumstances the widow is entitled to dower, as against the second mortgagee in this country, though this is not so in England.

[October 17.—Mr. Taylor.]

This was an application for leave to appeal from a report of the Master at Belleville after the time limited, under the following circumstances:

A first mortgagee filed a bill for sale of the mortgaged premises, after the death of the mortgagor. The mortgagor afterwards mortgaged the equity of redemption, and subsequently died. His wife joined in the first mortgage, for the purpose of barring her dower, but not in the second. A warrant having been taken out, after the sale, for the purpose of taking subsequent accounts, the Master in making his report thereon, found the widow entitled to dower as against the second mortgagee. From this finding the second mortgagee asked for leave to appeal. The motion was not made until more than six months after the date of the report.

Thorne in support of the application. The Master had no power to entertain the claim. It should have been raised on the first account. There was no account of rents and profits. *Dawson* v. *Bank of Whitehaven*, 37 L. T. N. S. 64, is expressly in point. No one can be prejudiced by the delay.

Hoyles contra. The delay is unreasonable and has not been explained. There is no ground for applying. The case cited is not in point. There is no equitable dower in England, while the law is otherwise here.

The matter was argued before the Master, sitting as Referee *pro tem.*

I refuse the application. The delay is great, and is not accounted for. In some cases leave has been given even after great delay, but in all such cases, some excuse for the delay has been given. Here, two days after the report was filed, the solicitor knew of the report and its contents, and stated in a letter to the defendant's solicitor his intention of applying, yet he took no steps to do so, for at all events six months.

I do not think the Master was wrong in reporting as he has done. It is not beyond his jurisdiction. He has only reported to the Court a special circumstance which under G. O. 220, he had the right to do. He has not taken any account of the amount due the widow, he has simply reported as a fact that her claim to dower comes in between the claim of the plaintiff and that of the subsequent incumbrancer. The amount to which the widow may be entitled has yet to be ascertained and then any question as to her past receipt of rents can be gone into.

At the time the Master made his report, the widow was, under the authorities, clearly entitled to dower. That she is not now entitled to dower can be argued only on the authority of *Dawson* v. *Bank of Whitehaven*, 37 L. T. N. S. 64. I have read that case carefully, and I do not think it is an authority in this country. The reasoning by which the Court of Appeal came to the conclusion that the widow was not entitled to dower was, that the wife having with the husband joined in a mortgage of the legal estate with a power of redemption she assented to her husband's estate being converted from a legal into an equitable estate; having done so, as the Master of the Rolls says, "she knew or must be taken to have known that one of the incidents to the legal estate, the inchoate right to dower, did not attach to an equitable estate. She extinguished her dower at law, and that extinguishment at law operated as an extinguishment in equity, because the dower did not exist in equity at all." Again he says, "the legal right to dower was extinguished, and the right to dower not being an incident to an equitable estate cannot exist for any purpose that can be recognized in this Court." L. J. Cotton took exactly the same ground, though he admitted that when dealing with property which a court of equity recognizes and assists a party in securing, as a mere equity, the general proposition is true that where a wife mortgages her property, she is considered as parting with that solely for the purpose of the mortgage and not further or otherwise. This was the view taken by V.C. Mowat in *Forrest* v. *Laycock*, 18 Gr. 611, and has ever since been in this country considered as the correct one. In another respect *Dawson* v. *Bank of Whitehaven* may be distinguished. The mortgage deed contained a power or trust to sell. That power was exercised in the life-time of the husband and the estate was converted into personalty, the wife assenting thereto by being a party to the deed.

The objection that the existence of a claim for dower should have been made known at the time of the original reference before the Master has no force. Had the defendants in possession of the report then made redeemed, no question as to the dower would have arisen. The widow would, as against the heirs, have been let in to her dower out of the land, freed from all incumbrances. It was only when the land had been sold and it became necessary for

the Master to report to whom the money was payable that it was important to notice this dower claim.

That no account has been taken of the widow's occupation of the land is an objection already disposed of. The Master has taken no account of the amount to which she is entitled for either past or future dower.

The application must be refused with costs.

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH.

IN BANCO, June 30.

Pearson v. County of York.

Municipal corporations—Repairs of road.

Held, under the evidence in this case that defendant's road was out of repair, and that if the action had been brought in time the defendants would have been liable for the injury to plaintiff.

Held, that the action, not having been brought within the three months required by sec. 409, Mun. Inst. Act, was too late.

Delamere, for plaintiff.

J. K. Kerr, Q.C., for defendants.

Re Kingston Election.

Controverted Election—Payment out of Court.

One thousand dollars, the deposit required to be paid in on Dominion Election Petitions, was handed to the Clerk of the Election Court, that Clerk being also Clerk of the Queen's Bench. The latter court, no petition having been filed in it, refused an order to pay the money out.

Dr. Stewart, petitioner, in person.

Britton, Q.C., contra.

Third National Bank v. Corby.

Note payable in American Currency.

Held, that a note made in this country may be made payable in a foreign country in the money of that country, but it must be in the recognized money of that country. The court, for instance, cannot know judicially what "American Currency" is. The decision of this case by Mr. Justice Wilson, (see ante p. 87), varied.

M. C. Cameron, Q.C., and *Clarke*, for plaintiffs.

Benson, for defendant.

Acheson v. McMurray.

Lease—Surrender by operation of Law.

The principles under which a lease becomes surrendered by operation of law, considered and discussed, and the authorities reviewed. And *held* that under the facts stated in evidence in this case, there had been such a surrender.

McCarthy, Q.C., for plaintiff.

Osler, for defendant.

Brockville & Ottawa Railway v. Canada Central Railway.

Bill of Exchange—Power of Co. to endorse.

The defendants, a railway company, wanting money for the purpose of their railway, drew a bill of exchange, which plaintiffs endorsed and paid on the failure of defendants to do so. The defendants in this action contending they were not liable as they had no power to make bills or notes.

Held, notwithstanding, that they were liable to plaintiff as for money paid to their (defendants') use.

S. Richards, Q.C., for plaintiff.

J. K. Kerr, Q.C., for defendants.

Graham v. Great Western Railway.

Collision—Negligence.

Action for an injury to a passenger being carried by defendants. Where negligence is shown on the part of defendants, it is not an answer to shew that the accident would not have happened if the colliding train, belonging to another railway, had not been negligently managed, also in not being stopped two seconds sooner.

Rock, Q.C., for plaintiff.

M. C. Cameron, Q.C., for defendants.

Postmaster-General v. Robertson.

Postmaster-General—Assignment of chose in action.

Held, affirming the judgment of Galt, J., that the Postmaster-General in his official capacity may take an assignment of a chose in action for the benefit of the Crown in the discharge of his duties; that the beneficial interest in such a chose in action would vest in the Postmaster-General under 35 Vict. cap. 12, O.; and that he could sue therefor as such.

Beaty, Q.C., for appellant.

Bethune, Q.C., for respondent.

Cahuac v. Cochrane.

Statute of Limitations—Acknowledgment in writin.

Plaintiff, having the paper title to a lot of land, obtained, in 1863, a written acknowledgment of

his title from one S., then in possession, and who with others had been in possession over 20 years. In 1867 S. sold to defendant.

Held sufficient to take the case out of the statute of limitations.

Patterson, for plaintiff.

Kerr, for defendants.

Re Attorneys.

Costs—Delivery of bill.

In an order made in chambers for delivery of bills of costs the attorneys having strenuously denied any liability, the order provided "that the costs thereof" (*i.e.* of the delivery of the bills and of the application therefor) "abide the result of the taxation."

Held, on appeal, that the words quoted should be struck out.

Donovan, for applicant.

Osler, for attorneys.

Bullivant v. Manning.

Sci fa—Public Company—Conditional agreement to take Stock.

Action against defendant as a shareholder of unpaid stock of the T. G. & B. Ry., by a creditor of the company. The defendant pleaded that he was only to become a shareholder on his obtaining a certain contract, which he never did obtain, and that he had never been recognized or treated as a shareholder by the Company.

Held, on demurrer, a good defence—affirming the judgment of Morrison, J.

Robertson, for plaintiff.

Ferguson, Q.C., for defendant.

Re Baird & Almonte.

Quashing By-Law to grant a Bonus—Interest of Municipal Councillors.

The village of Almonte passed a by-law granting $10,000 bonus to a Furniture Co., subject to the condition that no debentures should be given the Company till satisfactory evidence was given the Council that the Company was in *bona fide* working operation, and of being an institution otherwise worthy of the bonus, and also evidence of having a paid up capital of $35,000. When first read, four out of the five councillors were shareholders, and when passed the same number of councillors were shareholders.

Held, affirming the decision of Hagarty, C.J., that the by-law was illegal by reason of the interest of the majority of the Council in the Company.

Bethune, Q.C., and *Osler*, for appellants.

J. K. Kerr, Q.C., and *Mulock*, for respondents.

Fitzgerald et al. v. Johnston et al.

Chattel Mortgage—Description of property.

The special case having been amended and the chattel mortgage and schedule referred to in it submitted to the court, the judgment of Galt, J., reported ante p. 87 was reversed.

Meredith, for plaintiff.

H. Ferguson, for defendant.

Turner v. Dewan.

Ejectment—Evidence—Entries in cash book.

The plaintiff proved a paper title at the trial. The defendant claimed by length of possession, and the plaintiff, in proving payment of rent by the defendant, produced a cash book of a former owner T., in which were entries alleged to be of quarterly payments of rent. The entries shewed regular payments of $3 quarterly during two years by one D., under whom defendant claimed, but did not show on what account they were paid.

Held, that the entries in question were, *prima facie*, entries made by T. against his interest, and so admissible to corroborate other testimony on this point.

Held, also, apart from this, that on the evidence the plaintiff was entitled to succeed.

M. C. Cameron, Q.C., for plaintiff.

C. Robinson, Q.C., for defendant.

Driffill, Assignee, &c. v. McFall.

Promissory Notes—Trover—Vendor's lien.

One C., an insolvent, of whom the plaintiff was assignee, &c., shortly before the issue of a writ of attachment sold his mill property to one G for the sum of $8,500 taking a mortgage on the property for $6,000, and two joint notes of G. and one M. for $1,500 (on which $500 were paid), and $1,000 respectively. These notes were before the issue of the writ of attachment handed by the insolvent to defendant to keep for him, defendant at the time knowing the insolvent to be embarrassed.

To the assignee's demand, defendant denied that he held the notes and disavowed any knowledge of them, but he had meantime sent them to his brother at the insolvent's request. Both makers were worthless.

Held, that there being no special circumstances shewn, there was no vendors lien in respect of the notes. *Held* also that defendant was guilty of a conversion of the notes, but upon their being brought into court the verdict was reduced to one shilling damages.

McCarthy, Q.C., for plaintiff.

Osler, contra.

Re Hamilton & County of Brant.

"Temperance Act, 1864"—By-Law—Defects in submission.

To a by-law passed under the Temperance Act of 1864 it was objected that the notice did not state how long the poll was to be kept open in each polling place.

Held, not necessary.

Held, also, that the aggregate number of names on the assessment roll does not govern in deciding the number of days the poll is to be kept open in each municipality, but that in making up the voters list the names of women, minors and other non-voters might be omitted.

Robinson, Q.C., with him *H. J. Scott*, for applicant.

Smythe, contra.

CHANCERY.

Taylor v. Brown.

Chancellor.] [Oct. 3.

Redemption suit—Money paid for mortgagor.

The plaintiff was indebted to one McLeod, who sued out execution against the lands of plaintiff, and in order to save them he was induced by the promises of Mrs. C. Brown to convey the same to her in security, she undertaking to pay the amount of McLeod's claim. Instead of paying the debt she allowed the Sheriffs sale to proceed, and her son, the defendant, F. Brown, attended and bid in the lands as agent of his mother, and the Sheriff by deed poll conveyed the same to her. $75 was paid on account of the execution debt by or for Mrs. Brown, and a short time afterwards she died, when the Sheriff, in order to obtain the balance of the claim, proceeded again to sell the land, and F. Brown again attended, avowedly on his own behalf, and bid off the land, paying the balance of the debt and costs, and procured a deed in his own name from the Sheriff, and subsequently set up a claim to hold the land as absolute owner under the Sheriff's deed. Thereupon the present suit was instituted. A decree having been made declaring the plaintiff entitled to redeem, accounts were taken before the Master at Windsor, who allowed to the defendants the sum of $75 paid by Mrs. Brown, and also the amount paid by F. Brown on the second sale, charging the defendants with rents and profits received, and found a balance due them of $121.12. The plaintiff thereupon appealed from the Master's finding, contending that he should not have given F. Brown credit for the amount paid on the second sale which was void and ineffectual to pass any interest to the defendant, and that the amount Brown paid or was paid in his own wrong.

The Chancellor, after hearing counsel, dismissed the appeal with costs, observing in the course of his judgment that "it would seem that if the plaintiff had not charged the defendants with rents and profits, &c., F. Brown could not claim against him the amount paid by Brown to the creditor," quoting the words of Lord Romilly in *Teasdale* v. *Sanderson*, 33 Beav. 534, who, on allowing a joint tenant for improvements made by him on the joint estate where he was sought to be charged with rents and profits said, "I think these accounts must be reciprocal, and, unless the defendant is charged with an occupation rent, he is not entitled to any account of substantial repairs and lasting improvements on any part of the property."

CORRESPONDENCE.

Fusion of Law and Equity.

To the Editor of the Law Journal.

Dear Sir,—When we find such a subject, one of so great importance to our profession and the country, used merely as a text for stump speeches, without the slightest desire to make it intelligible either to the profession or the country—merely as an instrument by whose aid one party politician may wound the reputation of his rival, I feel you will agree with me it is high time to have it discussed fairly, thoroughly and impartially in the only place it has any chance of being so treated, viz., in your pages.

That sort of discussion of it has advanced it no further than this—the Hon. Mr. Macdougall twits the Hon. Mr. Mowat with having so long neglected to give us that much needed measure which he contends was always so easily accomplished, that it could be effected simply by passing such an act for Canada as the English Law and Equity Fusion Act, which he, Mr. Macdougall, would immediately do if put in Mr. Mowat's place, to which Mr. Mowat retorts—it will not improve

matters to put you in my place, as however insufficient my acts may be, the English Act works still worse.

Is that the way such a subject should be discussed? Is it not, on the contrary, merely evading discussion of it for some party end? If, as I suppose, we ought to assume, those gentlemen informed themselves as they ought to have done before alluding to it, why could not Mr. Macdougall admit, as the fact is, that such English Act has not accomplished all it aimed at, and shew as he easily could, and as Mr. Mowat probably would not deny, that the only reason that English Act did not accomplish all that is required and prove a complete success was because it omitted to do what Canadian lawyers twenty years ago, in your pages, pointed out was necessary to make such an Act a success, and why could not Mr. Mowat, well knowing that there is no impossibility in the way of passing a thoroughly satisfactory and perfect Fusion Act for Ontario, give some reasonable explanation of his reasons for not attempting to do so?

The partial failure of the English Fusion Act is solely attributable to the following imperfections in it which are easily avoidable, viz.: the English Legislature imagined that it was enough if they enacted per stat., that from and after a given day all their Courts of Law and Equity should be fused, without, after fusion, supplying them with any new and more comprehensive system of practice or procedure, or any better appliances than each of them had before, to grapple with and transact the new enlarged and entirely different volume of business they were expected to administer and adjudicate; a blunder as glaring as if they had enacted that from and after a given day, every ordinary old half inch auger, every time it was used for boring, should make a two inch auger hole, instead of, as theretofore, only a half inch auger hole.

What, however, most astonishes me is that Mr. Mowat should thus place so low an estimate upon his own abilities and those of the rest of the profession, as to take it for granted none of them at this day can do more than merely hunt up ans copy some English statute, changing the word "England" into "Ontario," wherever it occurs; and that if every English statute fails through even such apparent and easily avoided deficiencies to attain its object, that failure while it lasts must estop every one in Canada from attempting, even in the proper way which insures success, anything similar.

Only think how humiliating to us all it would be if that estimate were the correct one. It would shew a woeful degeneration within the last twenty years. Certainly twenty years ago and earlier we had amongst us many who could and did think and act originally, and most usefully, upon the subject of law reform, and who were far in advance not only of the English Law Reformers of their day, but also of the present English Law Reformers. But even if it were true that we can do nothing now but copy, why not copy those of our own instead of the inferior work of foreigners?

And now as to the proof of what I have above written. Any intending Canadian Law Reformer can, and the English Law Reformers also could (if it would not have been beneath their dignity) obtain from your pages enough to insure successful, thorough fusion of law and equity. The full and complete enunciation of the principles upon which the necessary legislation should be based, there to be found, must make the Fusion Act a complete success instead of a partial failure. I shall simply refer your readers to your journal for the years 1857, 1858 and 1859, under the heading "Chancery," in the index of each of those Vols., and particularly to the letters of "A City Solicitor," (3 U.C. L. J. 223 and 4 U. C. L. J. 71). There is there, however, other

matter not highly complimentary to the forms and mode of procedure in Chancery, which need not be imported into the present discussion. Much of what was then complained of has been since remedied, and a proper measure of fusion will remedy all that remains to be rectified. As, however, some, especially of the younger members of the profession, may not have those older volumes of your journal to refer to, for their benefit I insert the following extracts:—Your correspondent in 3 U. C. L. J. 228, says in substance and effect and in almost these words, in speaking of the fusion of law and equity he was then recommending—"give the common law courts what they want, the comprehensible, expansive and summary jurisdiction which chancery possesses in theory, but cannot put in practice—give the court of chancery what they want—the simple practical mode of practice of the courts of common law; let each court have besides its own jurisdiction, all the jurisdiction of the others, so that each and every of them will be courts of co-extensive and universal law and equity jurisdiction; make every superior court, whether of law or equity, use the same identical and no different system of practice and procedure, and give each and all of them a much more comprehensive, simple and perfect mode of administering justice than any or all of them, separately or collectively, now have, and re-assort all their judges so that each court shall have at least one equity and one common law judge, and thus be enabled to intelligently and properly adjudicate all questions of law or equity that can come before them. Again when speaking of the ordinary antiquated procrastination arguments, and deploring the timidity and tardiness of our most unwilling Legislative Law Reformers, he says they were doing nothing but "merely nib-" bling at the outside edges of three or four " of the leaves, instead of striking at the 'root of the evil." In his last letter, 4 L. J. U. C. 71 to 73, he endeavours to rouse them to immediately attempt something sufficiently thorough to have some chance of being practically useful, instead of continually passing crops of petty legislative enactments, each designed to carry out in the minutest possible fractions some, in itself, insignificant measure of reform, thus keeping everything for ever in a state of worry, transition and doubt, without accomplishing any reform worth having. He then uses this language,—"The only question worth con-" sidering is, are we, or are we not, for " ever to continue to proceed as hereto-" fore, with the dilatory removal, piece " by piece, of that immense mass of gross " abuses, which, from time to time, has " grown out of the parent trunk and " taken root, propagated, and spread over " its whole surface until the original is " completely enveloped, and nothing left " apparent but one heterogeneous mass of " useless corroding legal fungi, passing " one whole statute this year to remove " one solitary excresence, which statute " the court next year may pass rules to " carry into effect, which rules if they " have good luck, may apply to cases " which will occur the year after, in the " vague hope that ultimately at some al-" most inappreciable distance of time, " posterity, whose ancestors are yet un-" born, may derive the full benefit of what " we at any time, and now, might accom-" plish at one stroke by simply passing " some such statute as suggested in my " former letter."

Those were not the sentiments of a single man merely. On the contrary, they were then, and still are, the sentiments of the thinking minds in our profession. They are the sentiments of all except those who know nothing but mere chancery law who practiced nowhere else than in the chancery court, and who feel in themselves that they have not the capacity of learning what would enable them

to hold their own if the change occurred, whose occupation would be gone if such an act were passed. We could hardly expect them to permit such an act to pass if they could help it, and consequently it has not yet passed. They, at least, never attempted to controvert any thing that was written under the *nomme de plume* of "A City Solicitor;" they were cunning enough to know that was hopeless, and would only expose the weakness of their case. What they did was to temporize and procrastinate, to appease the then public feeling by granting as much as they dared not, for fear of annihilation, refuse, granting part of what was demanded and promising that the rest would be accomplished by degrees and before long, and omitting to accomplish that residue when the storm subsided, continually putting us off with large promises and the smallest possible measure of performance.

Is there any reason to doubt that the same game is still being played, and if it is, are we, who do not exclusively practice in chancery, interested in stopping it? I think we are, and for the following amongst other reasons. No matter whether it would or would not have been originally better to have left common law and chancery entirely separate, we have now gone too far with the fusion of them to get back to that position. We must, therefore go on, and *thoroughly* fuse them by making all our Superior Courts, which are not Courts of Appeal, both Courts of Law and Courts of Equity, to all intents and purposes. The sooner we do so the better for ourselves. Until we do, it is impossible to have any settled intelligible system of practice or pleading in any court; whereas, as soon as we shall do so, all will immediately be settled and become certain and intelligible, and we will not be compelled, as we now are, without any remuneration, to learn and keep ourselves up in two dissimilar antagonistic systems of practice, pleading and procedure, instead of only one system. Secondly, because, if effected upon proper principles, it will not only greatly improve the usefulness, practice and proceedure of all the courts, but will also, in the only way possible, without abolishing the Court of Chancery, get its practice and proceedure sufficiently in harmony with modern ideas to make it work satisfactorily, and do away with unnecessary delays, complications, technical obstructions of justice, and a host of petty expenses, impossible to be got rid of while its present system is retained.

I think, however, in carrying out what "A City Solicitor" has recommended, it would be well, in order to get rid of the injurious effects of the old inveterate prejudices which usually cling to old names when all the courts are fused, to abolish all their old names and re-name them. This would fix in the minds of their judges that their respective courts no longer differ from one another in any respect. It would also be well to make the act come into force upon a future day to be named, which day should be far enough off to enable all concerned to be able to study the new practice and proceedure the act would necessitate before it should come into effect. The act should also provide that a sufficient time before that day, the judges, or chief judges at all events, of all those courts, or a majority of them, should devise a new practice and procedure to be embodied in rules of court, which should apply always until changed, and equally to all the courts, and that no court should have any rule at any time which did not equally regulate every other superior court not being a court of appeal.

Many more details would, of course, be required, but these leading ones are enough to be mentioned in a communication like this, which does not aim at exhausting the subject, but merely to create sufficient interest in it to have it thoroughly discussed. If this discussion be had before the matter comes before Parliament,

as every sign of the times shows it very soon must, our profession at all events, will be thoroughly conversant with it, and able to bring their influence to bear upon it through their respective members. We may then have the proper sort of legislation upon it, which we never yet have had, and I believe without the aid of your journal, never will.

What we want, and at this late day, at all events, have a right to expect, is one really good act, which will settle everything for years to come, or at least put everything in the proper course to accomplish that result, instead of another series of that annually worrying legislation to which we have hitherto been subjected, each act of which reforms so little that the change, uncertainty and disturbance which it necessarily occasions does actually more harm than the miserably small and niggardly dose of legal reform we get does good.

In conclusion—as unexplained, this letter might by some be interpreted as a personal attack on Mr. Mowat, I beg to say nothing is further from my intention. I, in common, with I believe the whole profession, which includes persons of all shades of politics, entertain a very high opinion of Mr. Mowat as a lawyer. As a judge I, and I believe many others, have been accustomed to consider him, together with the late Chancellors Blake and VanKoughnet, as our very best judicial Reformers; men who as judges did all they could to work out justice, regardless of all mere forms and technicalities that fetter weaker men. No one who has practiced in their court can be unaware of the improvements they introduced during their time, or of what the country and the profession have suffered in losing them, but I confess it often troubles me and others of Mr. Mowat's personal friends to reconcile his very satisfactory record as a judge, his judicial courage and determination in pushing aside as far as he could, and so frequently as he did, the many inane technicalities which continually strove to interpose themselves between him and justice—with his far less satisfactory role of a legislative legal reformer. I can only account for it in this way,(which many who ought to know believe is the true one), viz.: that he could not give us all the legal reform he wished (as "A City Solicitor" suggested) without the aid of the Dominion Government; and that he has hitherto been unable to obtain that aid. And that he has been prevented by the exigencies of party discipline from divulging the causes which partially, at all events, excuse his delay.

I have the honor to remain,
Yours, &c.,
Q. C.

The Law of Dower.

To the Editor of the Law Journal:

Pursue we now the enquiry into the second division of this part of our subject, namely, the widow's consummate right to dower.

The husband being deceased, the whole element of contingency which characterized her interest as wife, having therefore disappeared, the widow stands in a new position with regard to her late husband's estate, in that she has an immediate right, consummate and vested in her person, to proceed against that estate for a third portion thereof, to be enjoyed for her lifetime. Whereas, she was a wife; now she is a widow. And whereas, she was, as wife, entitled but to wait for a certain contingency to happen, in order that it might be determined, whether she would ever actually enjoy in its fulness her then inchoate interest; now, that event having happened, consequent thereupon vests in her the power to assert her new right, and to ask for its immediate enjoyment. Whereas, prior to her husband's

death, she must *passively* have awaited that event; now she may *actively* assert her right, thereby acquired. Whereas, as wife, she had corresponding rights incidental to her position; now there exists a totally new relationship, incidental to which, are corresponding new rights. And it is the different relationships between the wife and her interest, and between the widow and hers, and the corresponding enjoyable or assertable rights incidental to each relationship, that we mean when we speak of the different qualities of the two rights. Though the *object* of her rights has been all along the same, she now bears a different relationship to it; and she has, incidental to this new relationship, a new right, viz., one consummate and vested, depending for its full enjoyment, only upon the exercise of her volition. But it has this peculiarity, that "it is probably the only existing case in which a title, though complete and unopposed by any adverse right of possession, does not confer on the person in whom it is vested, the right of reducing it into possession by entry:" *Park* on Dower, p. 334.

We have already seen, in the first of these letters, that she has not any estate in the land before the assignment of dower. She is but entitled "to have one established for her." In fine, as the authorities quoted in my last letter show, she has but a right of action, which she may assert, or not, as she thinks fit; but which she may yet forfeit by withholding the title deeds from the heir. This right, being a *chose in action*, could not at common law, have been assigned to a stranger. For "the common law regards the title of dower, for many purposes, as a mere right of action; and consequently refuses to permit its transfer, except by release to the terer-tenant, by way of extinguishment:" *Rose* v. *Simmerman*, 3 Gr. 600. Thus, it might have been released to the heir; or to the reversioner, or remainder-man, after an estate for life. Shep. Touch. 39; which release would be an effectual bar of her right, not only as against either of these latter, but also as against the tenant for life. *Ibid.* 328. And a release to the tenant for life might also have been taken advantage of by the remainder-man or reversioner. *Ibid.* She might also have released to guardian in chivalry; of which the heir might have taken advantage. *Ibid.* 327. But a release of all *actions* to the reversioner would not preclude her from suing for her dower: for she did not thereby release her *right*; and at the time of the release, she had no right of action against him. *Co. Litt.* 265*a*. *Altham's case*, 8 Rep. 151. But a release of her right of action, in order to be a present effectual bar, must be to the tenant of the freehold; for the immediate right of action was against him. But a release of all actions to the tenant of the freehold will not bar an action against the remainderman; since; but the action was released, the right still remains. For *jus prosequendi quod sibi debetur* was not released to the remainder-man. See *Altham's Case*, 8 Rep. at p. 152 *a*. At law, then, the right to deal with this interest was restricted to its extinguishment.

In Equity, however, we find that the right was assignable on the principles on which the Court of Chancery always allowed *choses in action* to be assigned. We find it thus laid down in Story's Eq. Jur. 1040: "They give effect to assignments of * * *choses in action*. Every such assignment is considered in Equity as in its nature amounting to a declaration of trust, and to an agreement to permit the assignee to make use of the name of the assignor, in order to recover the debt, or reduce the property into possession." This principle is illustrated by *Rose* v. *Simmerman*, cited *supra*. A widow had assigned her right to dower to her co-plaintiff; and a demurrer to the bill,

which asked that the dower be set out, was over-ruled by Blake, V.C. His Lordship in giving judgment, said:—"Such assignments operate, not as actual transfers, but by way of contract, entitling the party interested to come here for specific execution; and, as I can discover no principle upon which an assignment of a widow's title of dower should not have the same effect, I am of opinion that the demurrer must be over-ruled." The widow, then, upon an assignment of her right to a stranger, is in this position, that she, no less by her name's being joined in the proceedings with her assignee as co-plaintiff, than by the agreement or contract itself, evinces her desire to have the dower actually ascertained and set out, being under a contract with her assignee, that upon this being done he shall enjoy it; which contract, Courts of Equity will enforce. It has been asserted that the case of *McAnnany* v. *Turnbull*, 10 Gr., to which we have had occasion to refer before, is a decision conflicting with the former. But in the principle which is the subject of the above remarks, we have the key to this case, which instead of conflicting with *Ross* v. *Simmerman* serves rather to strengthen it. In *McAnnany* v. *Turnbull*, a purchaser at a sheriff's sale of the widow's right to dower, filed a bill to have the dower set out; and his bill was dismissed. Here the Court, finding that there was no such expression of the intention or desire of the widow to ask for that which the law allowed her did she wish it, could not enforce the right, because the element of assent necessary to a contract could not be found There was no such expression of an agreement or contract between the widow and the purchaser, as would suffice to cause the Court to act upon the principle above enunciated, and declare that she had, either by words or by actions, made a declaration of trust in favour of the purchaser. There was no desire expressed by her to have her dower set out. It was attempted to be done contrary to her wishes. This is plainly the ground of the decision, and not the lack of the quality of negotiability in the interest itself. For Vankoughnet, C., in delivering the judgment of the Court, says: "This right she may never assert. She may not choose to disturb the heir, or interfere with his freehold; and if she does not, who at law caw do it for her?" From which it is to be inferred, that, if the widow had chosen to "disturb the heir," her expression of her will would have been given effect to by the Court, even though, as in *Rose* v. *Simmerman*, she had asked it for another. We may therefore conclude, that the right to dower was not assignable at law to a stranger; though Equity would, in such cases, always enforce an assignment for value.

Such being the state of the law, the statute 35 Vict. cap. 12, O., was passed, which enacted that *choses in action*, arising out of contract, should be assignable at law. The question suggests itself, is this right a *chose in action*, "arising out of contract?" It is submitted that it is. It is said in the books to be claimable by the widow, "as of common right; which would imply a contract. It might not unfairly be argued also, that, being a right arising out of the marriage contract, it should therefore be held to be within the act. For, though not the actual object of the contract, it is still one of the natural and inevitable consequences of it; and must be contemplated as such in every marriage contract. This has been the opinion of many eminent judges, not least among whom is Sir Joseph Jekyll. Mr. Park, in his Treatise on Dower, however, in "adverting more particularly to the fallacies of this notion," assails the argument of Sir Joseph Jekyll on several grounds; with what success the learned (and if he have followed me thus far,

the patient) reader may judge for himself, from the contemplation of the following passage from that learned author's remarks: "This argument confounds the contract itself with the extraneous legal fruits of the contract. It is the very absence of contract for the provision of the wife, which calls into operation the positive law to counteract the injustice which might arise from the omission of such contract. Strictly speaking, the engagement between the parties is nothing more than a contract to enter into the respective relations of matrimonial union; and the law, contemplating the consequences of that contract, by its own silent operation raises a provision for the wife, in the event of her surviving, independent of and without reference to the agreement of the parties." p. 132. While we can readily agree with the learned writer, that the dower is neither the contract itself, nor the actual object of it, we may still make use of his remarks, to show that it is one of the "extraneous legal fruits" of it, or, in other words, that it "arises out of" it.

It also submitted that, failing to be brought within the strict letter of the statute upon the grounds already mentioned, if it be one of those cases where equity would uphold the assignment, then it is such an one as is contemplated by the statute, which appears to have been passed for the purpose of assimilating the jurisdiction of the Common Law Courts and the Court of Chancery, in respect of *choses in action*, imbued, as it is, with the well known doctrines and rules of equity on this subject. This proposition is fortified by a *dictum* of Moss, J. A., in *Wood* v. *McAlpine*, 1 App. R. 241, where his Lordship says:—"We think there is no reasonable room for doubt, that the object of the Legislature was to enable a person, who had become beneficially entitled to a *chose in action*, to sue upon it at law in his own name, instead of being obliged to use the name of his assignee, or to resort to a Court of Equity." Thus intimating, that where Equity would recognize an assignment of a *chose in action* and enforce it, this is a sufficient test of whether the assignment should also meet with recognition in the Common Law Courts, and be governed there by the rules of Equity embodied in the statute. If this view be a correct one, the widow's interest now stands upon the same footing in all the courts, and is an assignable one.

I understand that the question of its liability to execution is now before the Court of Chancery. I therefore refrain from making any further remarks while the point is *sub judice*; in the meantime, tendering you many thanks for the space you have so generously accorded me,

I am, &c.,

E. D. A.

Toronto, October, 1877.

Alimony—Unreported Decision.

To the Editor of the Law Journal:

Sir,—I think it is important to draw attention to an unreported decision in the case of *Henderson* v. *Buskin* on the subject of alimony.

In *Hagarty* v. *Hagarty*, 11 Gr., it was laid down by the present Chancellor, that it was contrary to public policy for the Court to grant a decree by consent in an alimony suit for the payment of a sum in gross; and in *Gracey* v. *Gracey*, 17 Gr. 113, it was also ruled by the same Judge, that the Court cannot grant a decree for alimony by consent, but that it was necessary for the plaintiff to prove a case, showing herself entitled to relief.

The principle involved in these cases subsequently came under consideration in *Henderson* v. *Buskin*, heard before V. C. Strong, in May, 1873, at Whitby. And the opinion expressed by the learned V. C. was altogether at variance with

the cases above referred to. The importance of the judgment in *Henderson* v. *Buskin* probably escaped the attention of the learned reporter, as I cannot find that it has ever been reported. So far as I have been able to gain any information about the facts of that case they seem to be as follows:

The plaintiff had filed a bill for alimony, and by consent of the parties, a decree had been made for the payment of $50 to the plaintiff in full of all claims. Subsequently the defendant committed adultery, and the wife filed a second bill for alimony, and a decree was made in the second case, pro-confessed in the usual terms, referring it to the master to fix an allowance. After this decree had been pronounced, the defendant applied to vacate the decree, and for leave to answer, and it appearing that the only question he wished to raise was, whether or not the decree made by consent in the first suit was a bar, V. C. Strong gave him leave to set up that defence by way of plea—which was accordingly done. The plea came on for argument before the present Chancellor who, following his former decisions, held the decree in the first suit invalid, and therefore no bar to the second suit. The decree in the second suit, therefore, was allowed to stand. The plaintiff then claiming to be a creditor under the decree in the second suit, filed the bill in *Henderson* v. *Buskin*, for the purpose of setting aside a transfer of property made by her husband to Buskin. In this latter suit, the defendants again set up the defence that the decree in the first alimony suit was a bar to the second suit, and that question was argued before V. C. Strong who, after taking time to consider, delivered, I understand, a very elaborate and able judgment, in the course of which he stated, that if the plea in the second suit of *Henderson* v. *Henderson* had been argued before him, he should have allowed it, as he considered that the decisions of the Appellate Courts of England were opposed to the prineiple on which that plea had been overruled. As the plea had been upheld, however, he considered it was not open to the defendants in *Henderson* v. *Buskin* again to raise the question.

It will thus be seen, that according to the judgment in *Henderson* v. *Buskin*, the parties to an alimony suit have the same power as parties to other suits to consent to a compromise, and to agree for the payment of a sum in gross, and that the Court may properly sanction by its decree any such arrangement. This view of the law, has of late, been acted upon by the Court, and it is therefore to be regretted, that the only *reported* decisions of our Court of Chancery should be at conflict with what is now its actual practice. It is to be hoped that report of the judgment in *Henderson* v. *Buskin* may be published, for although I believe I have accurately stated the result, still, not having heard the learned judge's judgment, nor having access to any authentic note of it, I have not been so presumptious as to attempt to state the course of reasoning by which the learned judge arrived at his conclusion.

Yours, &c.,

A Junior.

[We have been at pains to ascertain the substantial correctness of the above statement. We understand also, that the authorities on which the learned Vice Chancellor based his judgment in the case of *Henderson* v. *Buskin*, were the following: *Hunt* v. *Hunt*, 4 De G. F. & J. 221; *Wilson* v. *Wilson*, 1 H. L. C. 538, s. c. 5 H. L. C. 40; *Williams* v. *Bayley*, 2 L. R. Eq. 731; *Rowby* v. *Rowby*, L. R. 1 Sc. Div. App. 63.

Although most of these cases are prior in date to *Hagarty* v. *Hagarty* and *Gracey* v. *Gracey*, they do not seem to have

been brought to the attention of the learned judge by whom those cases were decided.—Ed. C. L. J.]

Recent Decisions—Hutchinson v. *Beatty*, 40 U. C. R. 135.

Toronto, Nov. 5th, 1877.

To the Editor of the Law Journal :

Sir,—I humbly conceive that you have not "read aright" the decision of *Hutchinson* v. *Beatty*, 40 U. C. R. 135, or you would not in your remarks headed "Recent Decisions and the Current Reports," have said the Court "held apparently that the limitation as to the time for the removal of the timber was bad." According to my reading of the case, the Court did not so hold, but held that the sale having been made before the issue of letters patent was good as against the patentees, although the timber, by the agreement between the parties, was not to be removed for ten years.

Your obedient servant,

Lex.

[The above letter from an esteemed correspondent is received as we go to press. It speaks for itself. As no one in the profession is more competent to give an opinion on the subject, we shall "take time to consider" until next month—Eds. L. J.]

FLOTSAM AND JETSAM.

The following extract from a British Columbia paper shows those judges "who dwell at home at ease" some of the difficulties under which their brethren in the colonies labour in performing their arduous duties. The English Government, when they appointed Mr. Justice Crease, probably did so because he was a sound lawyer; they may not have thought of any necessity for selecting a man of so much nerve and pluck. Mr. Crease at one time resided in Toronto, and some of his relations are still in this country. We trust the learned judge has since quite recovered from the effects of the accident which is referred to in the following extract :—

"While Judge Crease was riding over the trail between Sylvester's Landing to the town of McDame his horse stumbled and fell, the Judge being thrown forward on the pummel of the saddle (Mexican) from which he received very serious injury, which it was feared at one time might be fatal. Notwithstanding the intense suffering resulting from the accident the Judge, with a courage that excited the admiration and amazement of all, proceeded to hold Court while lying on a stretcher, and although physically so helpless that he could not move a muscle, he went through the business of the Court in a manner that showed him in no respect wanting in his wonted mental vigor. The deepest sympathy was manifested by the people of the district for the honorable and learned gentleman We are glad to learn that on his arrival here last evening Judge Crease was rapidly recovering from the effect of the fall. In coming out from the mines Judge Crease was packed over the trail between Deese Lake and Telegraph Creek, a distance of nearly 100 miles, on a stretcher borne by eight Indians. The situation was a trying one for the honorable Judge. No one who has not been over the trail over which he was carried will be able to form an adequate idea of the nature of the undertaking. The descent to and assent from the two forks of the Stickeen River was under the circumstances simply terrific. On more than one occasion the stretcher was necessarily in a perpendicular position with the Judge's head down hill, and had it not been that he was firmly strapped to the stretcher with strong leathern bands it is obvious that the Judge and his couch would oftentimes on the journey have parted company in a rather unceremonious manner. It is worthy of note that notwithstanding his constant suffering the Judge seemed to think more lightly of the dangers of the situation than any other person in the party that accompanied him."

Some years ago an English gentleman bequeathed to his two daughters their weight in £1 bank-notes. The eldest daughter got £51,200, and the younger £57,344.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Trinity Term, 41st Victoria.

DURING this Term, the following gentlemen were called to the Bar:—

James Vernal Tretzel.
Lyman Davis Temple.
Alfred H. T. Marsh.
Thomas Gibbs Blackstock.
Duncan Byron McTavish.
J. Wilmot Gordon.
Erastus Blair Stone.
James Henry Madden.
John Crerar.
J. Alexander McGillivray.
Wm. Seton Gordon.
Fredferick Montye Morson.
Charles Wesley Peterson.
Henry Auber Mackelcan.
Edward H. Tiffany.
T. Mercer Morton.
Charles Stephen Jones.
Elias Talbot Malone.
David Steele.
Philip Sanford Martin.
John Secord.
J Melbourne Kilbourne.

The following gentlemen, members of the English Bar, were admitted and called.

Richard Willis Jameson.
Isidore F Hellmuth.

The following gentlemen received Certificates of Fitness:

Duncan B. McTavish.
J. Alexander McGillivray.
Alfred H. Marsh.
Lyman Davis Temple.
Charles Wesley Peterson.
Peter Clark McNee.
Wm. Seton Gordon.
Charles Stayner Wallis.
Luther Kendal Murton.
John McSweyn.
Daniel Spencer McMillan.
David Steele.
Robert Shaw.
Thomas William Howard.
E. D. McMillan.
John Hind Hegler.
James Crowther, Jr.
John William Hector.
Henry Mortimer East.

And the following gentlemen were admitted into the Society as Students-at Law:

Graduates:

Walter Taylor Briggs, B.A., Trinity College.
Richardd Wornall Wilson, B.A., Victoria College.
George Beavers, B.A., Victoria College.
Edward Addison Emmett Bowes, B.A., University of Toronto.
Edward Betley Brown, B.A., University of Toronto.
Jacob Edward Lees, B.A., University of Toronto.
William Nesbitt Ponton, B.A., University of Toronto.
Paulus Æmilius Irving, B.A., Trinity College.
Alexander McBeth Sutherland, B.A., University of Toronto.

Matriculants:

Ernest Edward Kitson, University of Toronto.
James Martin Ashton, Albert College.
David Barker Stevenson Crothers, Albert College.

Junior Class:

Charles Oliver.
Arthur Virgil Lee.
Wm. Frederick Williams.
Charles Joseph Lyonard.
Walter Allan Geddes.
Collin Gregor O'Brien.
Augustine Foy.
John Christie
William Bannerman.
Patrick Sarsfield Carroll.
Alexander Armstrong Hughson.
Robert McGhee Flood.
Wm Evans Scott.
Frank Howard King.
J. Johnston Anderson Weir.
Loftus Edwin Dancey.
Samuel E. T. English.
Edward Arthur Lancaster.
Robert Alexander Porteous.
Francis Patrick Ford.
J. Rymal Taylor.
George Taylor Ware.
Robert George Barrett.

Ordered, That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission as Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects:—

CLASSICS.

Xenophon Anabasis, B. I.; Homer, Iliad, B. I. Cicero, for the Manilian Law; Ovid, Fasti. B. I., vv. 1 300; Virgil, Æneid, B. II., vv. 1-317. Translations from English into Latin: Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of quadratic equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; An examination upon "The Lady of the Lake," with special reference to Cantos v. and vi.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar. Translation of simple sentences nto French prose. Corneille, Horace, Acts I. and II.

or GERMAN.

A paper on Grammar. Musæus, Stumme Liebe Schiller. Lied von der Glocke.

Candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), are required to pass a satisfactory examination in the following subjects:—

Ovid, Fasti, B. I., vv. 1-300,—or
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

A Student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk, (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

All examinations of Students-at-Law or Articled Clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

DIARY FOR DECEMBER.

1. Sat...Last day for delivering appeal books.
2. SUN..*Advent Sunday.*
6. Thur..Rehearing term in Chancery.
7. Fri....Law Society Convocation meets. Rebels defeated at Toronto, 1837.
8. Sat...Michaelmas Term ends.
9. SUN..*2nd Sunday in Advent.*
11. Tues..General Sessions and County Court Sittings.
15. Sat....Court of Appeal sits. Prince Albert died, 1871.
16. SUN..*3d Sunday in Advent.*
17. Mo.....First Lower Canada Parliament met, 1792.
21. Fri...St. Thomas. Shortest day.
23. SUN..*4th Sunday in Advent.*
24. Mon...Christmas vacation in Chancery, and vacation for Judges Q.B. and C.P. sitting singly.
25. Tues..Christmas Day.
26. Wed..Upper Canada made a Province, 1791.
27. Thur St. John's Day, (the Evangelist.)
30. SUN..*1st Sunday after Christmas.*

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THE
Canada Law Journal.
Toronto, December, 1877.

"Lex," in the last number, drew our attention to the real decision of the Court in *Hutchinson* v. *Beatty*, 40 U.C.R., 135. Upon further consideration of the case, we admit that our correspondent is right, and that we misconstrued the observations of the Court upon an argument advanced by the counsel, that a limitation of time for the removal of timber sold must be implied from the language of the statutes.

SUPREME COURT REPORTS.

We have just received the first two numbers of the reports of the Supreme Court of Canada. The first number contains the cases of *Kelly* v. *Sulivan*, and *The Queen* v. *Taylor*, heard in June, 1876, and judgment given on January 15th, 1877. The second number contains four cases, in the last of which judgment was delivered on 27th February, 1877. There is no explanation given as to the delay in producing these reports. The reporter has not therefore the merit of promptitude; in other respects his work, we regret to say, cannot be commended.

It was hoped that the large remuneration given would have secured the services of some professional man, of general information and experience, and, if possible, not only familiar with the laws of the Province of Quebec, but also with those of the other provinces, who could well and intelligently report the decisions of the Court of final resort in this Dominion. Mr. Duval may be a good French Lawyer, but of the laws of the English speaking Provinces, of vastly more importance in wealth and population, he is profoundly ignorant. An earnest study for a few days of the excellent reports published in England would at least have enabled him to present the result of his labours to the profession in a style somewhat resembling those excellent models. It is manifest, however, that he has made no effort to fit himself for his sufficiently easy, but, as far as it goes, somewhat important position. We must hope that in time, when he has gained experience, and has seen the necessity for improvement, he will be found more equal to the occasion.

Let us now examine these reports and see whether our introductory observations are not fully warranted. The first case is *Kelly* v. *Sulivan*. We

are here given a very short and very imperfect introduction, which concludes by saying that "The nature of the questions decided, and the manner in which they arose, are fully set forth in the judgments given by their Lordships." Then comes the argument, which, it is not using too strong language to say, is, without first reading the judgments, absolutely unintelligible and meaningless. When the judgment of the Chief Justice has been carefully read, it is possible to ascertain to a certain extent what counsel were driving at. This case concludes with the judgment of Fournier, J., given, as we presume it was pronounced, in French; and this remark also applies to *The Queen* v. *Taylor*. Though, of course, *we* are excellent French scholars, and familiar with all other languages, and full of all learning, it may happen that some of our brethren in the various Provinces of the Dominion, except one are not quite as familiar with Lower Canada Law French as they might be. If some of the judgments of the Supreme Court are to be published in a foreign tongue, it will be necessary for those who are in charge of the education of law students in the English speaking Provinces to insist upon the French language being added to the curriculum. The learned reporter forgets that the major part of his readers do not know French, and are not likely to learn it simply for the pleasure of reading an occasional judgment in that language. We notice, however, in the second number that the English version is given. So possibly our remarks on this point may now not be necessary.

In the case of *The Queen* v. *Taylor*, the statement shews that the reporter does not know the difference between an action and an information. He states also that the "Attorney-General joined in démurrer," (p. 66) without having stated previously that there was a demurrer. The English language is played tricks with a few lines further on. The last paragraph on the same page is worded so clumsily as to require the reader to "take time to consider."

The cases are cited with about the same uniformity and exactness as they appear in the report of an argument in a country newspaper, *ex. gr.*—we see "M. and W." and "M. & W." beside each other. On another page, "U. C. R." and "U.C. Q.B." The names of cases, of text books and of reporters, are sometimes printed in "Roman" and sometimes in italics. In fact there is a super-abundance of the latter type to be found throughout. "*Earl*, C. J." is given for *Erle*, (p. 89;) "Lord St. Leonard," for *Leonards*, (p. 95;) "Patterson, J." for *Patteson*. The authorities cited by counsel have not been properly verified, ex. gr.—the case of *Holmes the Spiritualist* is referred to, but no citation is given of the report where the case may be found. So, a reference to 14 Ves. should have been given in connection with *Huguenin* v. *Baseley*, not *Huguessin* v. *Basely*, as printed. There is, also, a pleasing variety in the style of the type used in these references (compare pp. 109 and 116).

In *The Queen* v. *Taylor*, the reporter, amongst many minor inaccuracies, has not taken the trouble even to spell correctly the names of the attorneys for the respondent.

The second number begins with the case of *Boak et al.* v. *The Merchants' Marine Insurance Co.* There is no caption or short heading to the digest of this case. In another case may be noticed such pure carelessness and want of uniformity as this—"Ritchie J." and "Mr. Justice Henry," (see pp. 214, 230,) and other minor matters without end. It may be said that these things are of little consequence, and if the matter of the reporting were well done one might excuse

them in a beginner. But unfortunately the whole thing is bad.

We have not referred to a tithe of the mistakes and omissions in various places, nor to the evidences either of carelessness or lamentable ignorance on the part of the reporter. We have referred to enough to make it apparent that some change is necessary. The usefulness of the Supreme Court will be much impaired if reports such as the numbers before us are allowed to be published.

THE LEGAL EFFECT OF A CHEQUE.

In *Keene* v. *Beard*, 8 C.B.N.S. 372, Mr. Justice Byles says a cheque is an appropriation of so much money of the drawer in the hands of the banker upon whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person. If this is to be taken without any qualification it would lead to this result: that a cheque *per se* amounts to an equitable assignment of so much money as it calls for in favour of the payee. After this manner Judge Story, in *In the matter of Brown*, 2 Story, 516, speaks of a cheque as an absolute appropriation of the sum named therein, in the hands of the bank for the benefit of the cheque-holder. But it is submitted that this is not the case in law, so far as the bank is concerned, until at least there has been a presentment and demand for payment. In the case of *Schroeder* v. *Central Bank of London*, 24 W.R,, 710, Archibald, J., says: "A cheque is simply a request to pay so much money; and it is a revocable request. It does not purport to be an assignment at all." And in the same case the like views were expressed by Brett, J., that the cheque is but an order to pay, and not an absolute assignment of anything, To the same effect as this is the decision of the Master of the Rolls in *Hopkinson* v. *Forster*, L. R. 19 Eq. 74, where he holds that in equity a cheque is not an assignment by the drawer *pro tanto* of his balance at his bankers. And in *Caldwell* v. *The Merchants' Bank*, 26 C.P., 294, it was held upon demurrer that the holder of a cheque, by the mere fact of its being drawn in his favour, acquires no right of action in equity, as upon an equitable assignment, against the person upon whom it is drawn. There is an important case of *Lamb* v *Sutherland*, 37 U.C.R., 143, where most of the authorities bearing on this question are collected.

It is very clearly decided that the death of the drawer before presentment, operates as a revocation of the request to pay, because upon a man's death his assets go to his personal representatives: *Tate* v. *Hibbert*, 2 Ves. Jr. 111; *Cumming* v. *Prescott*, 2 Y. & C., Ex., 492. It is very commonly laid down in the text-books that if the bank honours the cheque by payment, in ignorance of the death of the drawer, it will be absolved in a court of Equity. Nevertheless this view may be perhaps relegated to that region of law which is spoken of as "law taken for granted." Recent decisions are at variance with this proposition, though we are not aware that the point has been expressly decided. In *Hewitt* v. *Kaye*, L.R. 6 Eq., 198, it was held that the delivery of the donor's cheque on his banker, which was not presented before his death, did not amount to a *donatio mortis causâ*. Lord Romilly, M.R., said: A cheque is nothing more than an order to obtain a certain sum of money. It is an order to deliver the money; and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing. It is worth nothing until acted upon, and the authority to act upon it is withdrawn by the donor's death. A similar decision was given by Vice-Chancellor Bacon in *Beak* v. *Beak*, L. R. 13 Eq. 489, where he is reported thus: "If

the cheque is not presented till after the donor's death, for the amount of that cheque his estate is not liable." *When the cheque is presented*, the distinction in such a case is marked in *Bromley* v. *Brunton*, L. R. 6 Eq. 275, where it was held that this was a good gift *inter vivos*, though the payment of the check was refused because the signature was doubted, and the drawer of the cheque died the day after. Sir John Stuart, V. C., said: "The effect of the cheque was to appropriate so much of the donor's money, and the funds are in the hands of the executors just as much liable to the payment of the cheque as they were in the hands of the banker."

HON. WILLIAM HENRY DRAPER, C.B.

Last month we chronicled the death of this distinguished man and eminent jurist, the last of the Judges of the old Court of Queen's Bench. It needs not that we should again state how great the loss has been. It has not, however, come as a sudden blow, for his failing health had gradually taught us that very soon the brilliant lawyer, and the courteous, honorable gentleman must leave the scene of his labours and his triumph. The loss indeed occurred before he went to England on leave, for it was then becoming evident that his time for work was rapidly passing away, and that the end was comparatively near. Such, however, was the strength of his constitution, that for months, weakened as it was by constant and often intense pain, it resisted the last enemy. How bravely and patiently he bore his sufferings, without a murmur, calm, kind and thoughtful to the last, is known only to those few who were constantly with him.

Some years ago when speaking of the address presented to Chief Justice Draper, on his leaving the Court of Queen's Bench for the Court of Appeal, we briefly referred (ante vol. 5, p. 29) to the main incidents of his life. It will, however, be interesting to those who may not have that volume at hand to recapitulate them here, with a few additional particulars.

Chief Justice Draper was born in the County of Surrey, in England, on the 11th of March, 1801. His father was the Rev. Henry Draper, D.D., Rector of St. Antholin, Watling street, London, and afterwards of South Brent in Devonshire. He at first chose the sea as a profession, and had he chosen to remain there, though Canada would have lost one of her brightest ornaments, another famous name might have enriched the proudest roll of England's worthies. His cool head, fearless courage, powers of command and endurance would have made him a sea captain second to few. On the deck of an East Indiaman he shewed the stuff he was made of, when, alone at his post a young cadet, he defended it from mutineers till assistance came, felling one of his assailants dead at his feet with a blow from a handspike, his only weapon. But he had other gifts which fitted him for a still higher position in the service of his country—a keen intellect, sound judgment, a ready tongue, and a polished eloquence were combined with a retentive memory and great industry. It was well therefore that young Draper left his first love, (though he never forgot it), and came to this country to seek his fortune.

He arrived at Cobourg on the 4th June, 1820, and three years afterwards commenced the study of law in the office of Thomas Ward, Esq., of Port Hope. He subsequently went into the office of Hon. G. S. Boulton, and for some years added to his slender income by acting as Deputy Registrar of Northumberland and Durham. Like many other men known to fame he married early in life, while yet a student, in the year 1826. His choice was Miss White, daughter of Capt.

George White, R.N., who survives him. At this time he lived some seven miles from his office, but he always walked there and back. Those that know this will not so much wonder at the regularity with which, in storm or sunshine, up to the time of his last illness, he walked every Sunday to and from St. James Cathedral, where he was a constant worshipper.

After he was called to the Bar he came to Toronto, and took charge of the business of Sir John B. Robinson, then Attorney-General, and at his suggestion, he having been much struck with the manner Mr. Draper had prepared for trial an intricate case on real property law.

Mr. Draper was called to the Bar 16th June, 1828, at the same term as Peter Rapelje and David Lockwood Fairfield, and the term previous to the calling of Henry Sherwood, Judge Hagerman, Judge Sullivan and Chancellor Spragge, and soon took a foremost place amongst the many eminent men of that day. On 18th November, 1829, he was appointed Reporter to the Court of Queen's Bench, which office he held until he became Solicitor-General. In 1842 he was given his silk in conjunction with Henry John Boulton, Robert Baldwin, Henry Sherwood, and James E. Small.

The story of Mr. Draper's life from the time that he went to Parliament until he was appointed to the Bench is the history of Canada; and we do not propose to speak at any length of this most eventful period of our country's history. Suffice it to say that early in 1836 he was elected to the Legislative Assembly as member for Toronto, and in December he was called to the Executive Council without a portfolio. On the 23rd March, 1837, he became Solicitor-General, which position he held until the Union of the Provinces, under Lord Sydenham. On the 13th February, 1841, he became the first Attorney-General and Premier of United Canada, Robert Baldwin being Solicitor-General. On 10th April, 1843, he was made a Legislative Councillor; but at the request of his friend, Sir Charles Metcalfe, the then Governor-General, whom he much esteemed and supported manfully, he resigned his seat in the Upper House and again became Attorney-General, sitting in the Legislative Assembly as member for London. On 12th June, 1847, he was appointed a Puisne Judge of the Court of Queen's Bench, then composed of five judges, in the place of Mr. Justice Hagerman, deceased. How faithfully he served the successive Governors of the Province, and how eloquently he upheld and fought for what was then a falling cause, turning defeats into apparent victories by his marvellous persuasiveness and skill as a debater, and how gladly he left the turbid sea of politics for a profession that he loved—are all recorded in the pages of history. He did not escape, as of course he could not, the sneers and jealousy of pretended friends nor the abuse of malignant partizan opponents at a time when political parties were at daggers drawn, when old things were passing away, and when all things were becoming new. Bookmakers even of the present day unfamiliar with the true position of matters which transpired but thirty years ago, may still reproduce the silly sneer or the worn out story of an hour. But the time will come when full justice will be done to the memory of the most subtle legal intellect, the most able lawyer, the most accomplished speaker, and one of the most courteous gentlemen that Canada has as yet seen—one also whose name has not in a long life-time been tarnished by any dishonourable act; and when his faults, for faults of course he had, will be weighed with a true balance, and he will be judged in relation to the times wherein he lived and the circumstances surrounding a most trying political situation.

Mr. Draper's talents as an advocate

were of a high order, but he was not as successful as many men far inferior to him in learning and intellect. His language was most elegant, and it might have been said of him as was said of Wilberforce, "How the English trickles on his tongue." But his speeches, though perfect in their way, did not go to the hearts of men as did the burning words and eloquent, soul-stirring utterances of his friend and cotemporary, Mr. Hagerman, who is said by those who have had a good opportunity of judging to have excelled all men of his day in Canada in public speaking, and to have been probably the best Nisi Prius advocate that has as yet appeared at our Bar. Mr. Draper spoke "over the heads" of the jurymen it has been said; they were in fact unable to appreciate the beauties which a more educated class so much admired. There was also probably a want of that mesmeric sympathy without which the most faultless speaker fails to convince those hearers who must be reached through their hearts rather than their heads. But when Mr. Draper spoke to an audience of a higher stamp, as when addressing the House of Parliament, or the Bench, or the Bar, or some gathering of educated men, his words charmed like the sound of evening bells. His arguments were arranged with a crushing, logical sequence, whilst his thoughts (the thoughts of a man of intellect and high mental culture), clothed with the most appropriate words and elegant language flowed like a river, without hesitation and without apparent effort.

It will be as a judge, however, that Mr. Draper will be best known to posterity. His career on the Bench occupied a period of over thirty years. He was first appointed, as we have seen, in June, 1847. On 5th February, 1856, he succeeded Sir James Macaulay as Chief Justice of the Common Pleas, and many practitioners will remember how the business flowed into that Court during his presidency. He remained there until he was transferred to the Court of Queen's Bench, becoming Chief Justice of Upper Canada in place of Chief Justice McLean, who was made President of the Court of Appeal on the 22nd July, 1863, which office was rendered vacant by the death of Sir John Beverley Robinson.

After spending twenty-one years in the unremitting discharge of his judicial duties, Chief Justice Draper, in March, 1868, was induced by his friends to ask for, and of course obtained, six months' leave of absence, which he spent in a visit to the Southern States. His next and only other leave was when he went to England in September, 1876. If ever holidays were earned, these were. He was one of the old-fashioned men who knew no call but that of duty. His own ease and comfort had no place in his vocabulary. It is well to keep in remembrance the brave, devoted, old-time names of Robinson, McLean, Macaulay, and Draper, as beacons to encourage those who, coming after them, would fain build up such a worthy, undying record as these have left behind them.

Mr. Draper's excellence in his judicial capacity was not only that he was a deep read, sound lawyer, expressing himself with remarkable clearness (and, of course, did justice between the parties without fear, favour or affection—the judges of Upper Canada have ever done that). But it was that, in looking upon law as he did as a science, he became its expounder and teacher, and was not merely an arbitrator to settle a disputed point between two litigants. His judgments were not addressed to the parties to the suit; these persons were subsidiary to and only appeared to have been introduced as illustrations of the point of law under discussion. In this respect there was a marked difference between Mr. Draper and his

great predecessor, Sir John B. Robinson. The latter evinced a desire in his judgments to convince the parties of the correctness of the conclusions at which his mind had arrived, a kindly endeavour from out the large-hearted sympathy of his nature, to prove even to the disappointed suitor that the law was right and he was wrong. Although this feature prevented the former from winning the hearts of the people to the extent that the latter did, it nevertheless makes his judgments possibly of greater value to the profession as purely legal problems.

No judge on the Canadian bench, with the exception of Chief Justice Robinson, whose judgments must be looked at from a somewhat different standpoint, has left his mark so distinctly on the jurisprudence of this country. His law is clean cut, no jagged edges; no ends to pick up at the end of a judgment. He never deviated from the point at issue. He gave the law, the whole law, and nothing but the law on the particular subject in question at the time. No *obiter dicta* were dropped, as they too often are, to obscure the legal proposition before him, or to give rise thereafter to the endless perplexity of case lawyers or diffusive judges. It has been said that Sir John Robinson resembled Lord Mansfield in his desire to soften the rigour of the Common law. The tendency of Mr. Draper's mind was rather to uphold the law and its practice in their strictness; but this even had its advantages, as expressed in what has been said of Mr. Draper's rulings, "that one knew always where to find him."

As a judge at Nisi Prius he was preeminently satisfactory to the Bar and to the public. His demeanor was dignified and courteous; and he brooked no interference with or derogation of the majesty of the law. His decisions were given in his own peculiarly clear, unhesitating manner, carrying conviction with them, and rarely reversed in Term. Juries, as a rule, paid great deference to views expressed by him in charging them, but he was as careful to leave them to perform their proper functions without interference, as he was to reserve to the Court its duty in laying down the law regardless of consequences. But though his charges were admirable, they were not always sufficiently down-right and plain spoken for the average juryman. We remember hearing an old friend of his, who held a brief in the case, a heavy commercial suit with a special jury, speaking of an incident illustrative to this. The Chief took great pains to explain the matter, and delivered what the Bar spoke of as a faultless charge. At its conclusion to his great mortification, as he afterwards stated, one of the jury asked him a question which shewed that he had utterly misunderstood the real nature of the dispute. In his sentences in criminal cases he was said to have been somewhat severe, having a strong opinion that this was necessary for the protection of the public.

We have before us an address presented to him on 10th October, 1868, by the grand jury of the city of Toronto. His reply exemplifies traits in his character which were well understood by those who knew him well. In one part of the address the grand jury, after speaking of the urgent necessity for the establishment of a reformatory for girls, spoke of the propriety of inflicting corporal punishment in certain cases. The Chief Justice in his reply is reported to have said:

"The allusion to the reformatory for boys and girls, the propriety of establishing which had been so frequently discussed by the public press, afforded him an opportunity of expressing as he had always done when the subject was mentioned, the hope that the government would consider it their duty to prepare for the erection of such institutions, and he had no doubt that the beneficial effect would soon evi-

dence itself in the improved condition of the class of criminals who might be sent for a limited time beyond harm's reach instead of being confined in jails. Another subject was alluded to in the presentment, namely, the infliction of corporal punishment upon the incorrigible class of juveniles and hardened adults, for whom no term of jail confinement could be considered an adequate punishment for the crimes they committed. He himself had always expressed from the bench whenever he had occasion to refer to the subject, the opinion he entertained of the propriety of restoring to this species of punishment in the cases referred to, and he had no hesitation in now declaring his cordial concurrence in the recommendation on this point by the grand jury, nor had he any hesitation in declaring that the class of men, calling themselves human beings, whose brutal and ruffianly conduct, frequently towards women, inflicting upon them serious bodily harm, and many of them their own wives, whom they were bound to protect, should be the first on whom this corporal punishment should be inflicted. He never had any of the mawkish sympathy which unfortunately but too often exhibited itself in behalf of this brutal portion of the community, sanctioning as it were ferocious attacks on the unprotected of the other sex, and whom every effort known to the existing laws had hitherto been of no avail in restraining such lawless propensities."

The grand jury on the same occasion alluded to the rumored retirement of the Chief Justice from the Queen's Bench in the following words:

"In thanking your Lordship for the able and lucid remarks that you were pleased to address to us at the opening of this court, the grand jurors cannot avoid referring, with great regret to the current rumor, which points to the probable retirement of your Lordship from the Bench, which, first as Puisne Judge, and subsequently as Chief Justice, you have occupied for about a quarter of a century. They would fain hope that the rumor is unfounded, as the loss to the public by your retirement would be deeply deplored by the community at large. If, however, from ill-health or other causes, you should feel constrained to resign, your Lordship may feel assured that your long and laborious services in the administration of justice, which you have discharged with eminent impartiality and ability, will ever be appreciated by the people of Ontario."

The grand jurors concluded with an expression of their sincere desire that, on his retirement, he might enjoy that peace and quiet of mind which are inseparable from a conscientious discharge of the arduous duties to which they had referred. His Lordship replied in feeling terms, thanking the grand jury for their good wishes, and intimating his willingness still to serve his country should his services be required in some position where his energies might not be taxed to the same extent as they were in his then present position. He concluded his remarks by indulging the fond hope that when it was God's wish to remove him from the world, that the services which he was prepared thereafter to do for his adopted country would secure for his memory the kind appreciation which the grand jury had so feelingly expressed in regard to his past judicial conduct.

The address presented to Mr. Draper by the Bar of Ontario when he took his seat as President of the Court of Appeal, and his reply thereto, were published in our columns in February, 1869; but, for the sake of completeness, we repeat it:

"Her Majesty having been graciously pleased to accept your resignation as Chief Justice of Upper Canada and subsequently to appoint you as President of the Court of Error and Appeal, we, the Law Society of Upper Canada, beg leave respectfully to address you, and to convey to you our sincere thanks for the unvaried courtesy and kindness which, in the exercise of your judicial office, the members of the legal profession have received at your hands, for a period extending over more than twenty years. It is to us a subject of unfeigned satisfaction that your talents and learning are not to be lost to the country, but that you will hereafter preside in the Court of ultimate resort in this province. We trust that on an occasion like the present you will excuse our calling attention to the course of your professional life as an example and encouragement to those who devote themselves to the study of law, as showing that, without any adventitious aid, but solely by the exercise of your own ability and industry, you have successfully, with satisfaction and applause, discharged the duties of Solicitor-Gen-

eral, Attorney-General, Puisne Judge and Chief Justice.

"That you may long continue to fill the dignified position which you now hold, is the sincere prayer of the members of the Law Society."

The reply was as follows:

"I thank you very sincerely for this address. Since my first appointment to the bench, it has been my constant effort to cultivate the most friendly relations with the bar, and I feel no slight gratification at my success, as testified by this mark of your approval, in which you mingle the expression of your satisfaction at my past career with a kind wish that I may yet awhile continue to discharge judicial duties. I have, in my turn, to express my warm acknowledgments to the bar, generally, for their universal attention and respect to me in my intercourse with them as a judge, as well as for unnumbered marks of kindness and regard to me individually. If I have attained any success in my efforts to maintain that confidence in the purity of the administration of justice in this Province, which existed in the days of my eminent predecessors, I owe it, first, to the co-operation of those learned judges who shared my labors, and next to the ability and assiduity of the members of the profession whom you represent. Upwards of forty-five years ago I first entered my name on the books of the Law Society, of which I believe I have still the honor to be a bencher; and though I passed some years in the active duties of public life, I never severed myself from the diligent practice of my profession. I rejoice that while sinking into the vale of declining years, I am still thought able to be of use, and that I can maintain the connection which has existed during the best part of my life. I trust that I shall be enabled to pursue the same course which has procured for me this flattering mark of your esteem, and I look forward with a hopeful confidence to a continuance of that support and assistence to which I have been so deeply indebted in my past career."

The name of Chief Justice Draper will appear in the history of Canada, not merely however as a lawyer. He took an intelligent and large interest in the welfare of his adopted country. In his answer to an address presented to him on the occasion of the opening of the new court-house for the county of Norfolk, in the year 1864 (see 10 U. C. L. J. 313) he said it was not the least proud one of his recollections, that when in political life thirty-three years previously, it was his pleasurable duty to introduce into the Legislature of Canada, at the instance of its originator, and framed by him, the bill which was the foundation of that great code of common school education, which, in the annals of history, would render Dr. Ryerson's name immortal.

In 1857, Mr. Draper, then Chief Justice of the Common Pleas, was appointed by the Canadian Government as a special envoy to England to lay before the Home authorities Canada's rights in connection with the Northwest territories. This appointment was much spoken against by some of the party organs of that day, and Mr. Draper, of course, came in for his share of hard words. It is now, however, we believe, universally admitted not only that the selection was itself the best that could have been made, but that it was also a position which the Chief Justice could honorably accept. That he did accept it was always to us the best proof of this, and time has justified it.

In the year 1854 he received the ribbon of a Companion of the Bath, as a mark of special favor for his services. He was offered knighthood more than once, but declined it.

Mr. Draper was the first President of St. George's Society in Toronto, and also first President of the Toronto Cricket Club, (of which, in subsequent years, his youngest son was a distinguished player.) He was at one time President of the Philharmonic Society. We learn from Mr. Scadding's Toronto of Old, that Mr. Draper presented to the inhabitants of Toronto, on his ceasing to be one of its representatives, a public clock which was placed in the belfry of St. James' Cathedral. This gift, however, was unfortunately destroyed when the church was burned in 1849. He took great interest in later years in the proceedings of the

Church Association, of which he was President. No important step was taken without consulting him, and their tracts and papers were, we understand, always submitted to him for his advice and concurrence.

Mr. Draper was a man of great literary taste, and kept up his general reading to the last. His favorite out-door recreation was the cultivation of his garden. Many a pleasant walk has the writer had with him there. Whatever he did was done well, and done thoroughly, and his garden was no exception, his own hands doing much of the work; his taste and intelligence making the whole a success.

Though the Chief Justice had a keen zest for the amenities and enjoyments of life, in later years he appeared but little in public, and seldom left his own fireside. Few, however, could make themselves more agreeable, and to those who had the privilege of his friendship, his conversation was peculiarly charming. Few men remembered more clearly the history of the past, and few knew more of what was going on in the world around him, or could so shrewdly and learnedly discuss men and things of the present. The charm of his courtly manner was always great, but the softening influence of age and his many trials made it irresistibly so. Those who had only seen him on the bench could faintly understand this, but his intimate friends thoroughly appreciated its truth. Though never harsh in speech, and never allowing his temper to get the better of him, his rebuke cut like a knife when called upon to notice any dishonorable act or any injustice or impropriety, or when any unprofessional conduct was brought to his notice.

A learned, clear-headed man himself, with a wonderfully keen and quick perception, and with a power of sarcasm seldom equalled, he may sometimes have seemed impatient with those whose density he could not readily enlighten. This, however, was not the case with those who honestly tried to do their best. What he abhorred was *pretentious* ignorance, and stupidity bred of indolence. Woe betide the counsel that "threw his case" at the Chief Justice, but the youngest and rawest student who had made a faithful endeavour to work up the simplest point of practice in chambers was sure to receive full meed of consideration at his hands. He was not popular with the Bar in the sense that some judges have been, but what was better, he had the unqualified respect and admiration of every barrister whose good opinion was worth having.

No one was ever more ready to give to others the benefit of his knowledge and experience, on all matters on which his opinion might be asked. His brother judges have time without number gone to him for his advice on difficult points, and the wonderful stores of his mind and his memory were opened to them in no niggard fashion. His public duties were onerous and devotedly performed. In private life, he had his full share of sorrows and trials, but he had a brave, self-contained and enduring nature that sought not sympathy, and he was too strong a man "to wear his sorrows on his sleeve for daws to peck at." In his own house he was kindness and forbearance itself, a loving father adored by his children.

His family was large, five sons and four daughters. He followed seven of them to the grave. Only two survive him, Mrs. Hamilton, the wife of John Hamilton, Esq., County Attorney at Sault Ste. Marie, and Major Draper, also a barrister, but now chief of the police in Toronto. His eldest son, William George Draper, was for some time County Judge at Kingston, a lawyer of ability, and author of an edition of the Rules of Court,

and a handy book on the Law of Dower.

Chief Justice Draper has left behind him a name which will never be forgotten as long as Canada is a country. His fame is in the enduring monument of its laws, and recorded in the pages of the legal records that are adorned and illuminated by the depth of his learning and the brightness of his intellect. The remembrance of the eloquent speaker, of the tall, courtly figure, and courteous manner of the amiable, accomplished and high bred gentleman, whose name was synonymous with honor, will in time fade away, but the name of Chief Justice Draper, the learned, able and upright judge, will remain, until Canada itself is forgotten.

His end was perfect peace, though he of most men (in this country at least) might have succumbed to the pride of intellect, and might have boasted that himself had placed him in the high position he occupied. His humility at the last, and his simple confiding trust in the Redeemer's promise, was that of a child reposing in the utter, unquestioning love of an indulgent father. Like his great predecessors, whose names he delighted to honor, he lived an example to our profession for all time to come; and like them he died a witness of the great truths which less gifted men sometimes affect to despise.

CONSTITUTION OF APPELLATE COURTS.

Lord Beaconsfield has called down upon his head an amount of adverse criticism that would have appalled a weaker or less-experienced man. With scarcely an exception, the English papers both legal and lay, have called in question, and some have commented most severely upon the appointment of Mr. Thesiger as a Lord Justice of Appeal. Let us take an example from each class. The *Law Journal* says:

"The Earl of Beaconsfield loves to illustrate his own famous aphorism—'Nothing happens except the unexpected.' Who would have imagined that the choice of the noble Premier in the matter of the vacant judgeship in the Court of Appeal would have fallen on a gentleman who is only thirty-nine years of age, and who became qualified for the office but four months ago? * * * * * *

"Let us assume that the Hon. Alfred Henry Thesiger will do his work thoroughly well; and when we so assume we desire to add that for our own part we believe in the justice of the assumption. Is the appointment for all that, a satisfactory one? We freely admit the advantage of having judges in the prime of manhood, and we certainly are not in favour of promotion by seniority. But it is a bold enterprise to set Mr. Thesiger in an office where he may have to overrule the opinions of men like Lord Chief Justice Cockburn, Lord Chief Justice Coleridge, Mr. Justice Lush, Mr. Justice Lindley, possibly even the opinion of the Master of the Rolls or of Vice-Chancellor Hall. Is it wise, moreover, to pass over the whole body of judges of the High Court, and to resort to the ranks of the bar for an appellate judge? We know that Lord Chancellors have generally been chosen directly from the bar, and we know that the law officers of the Crown have frequently been elevated to the highest judicial posts. But Mr. Thesiger is not Attorney-General, and so cannot have the prestige or experience of an Attorney-General. These imaginary precedents do not really apply to the case. The Prime Minister has, in effect said to each of the judges of the High Court: 'Do not think that the Court of Appeal is to be recruited from your ranks, or that proof of justice talent, discretion, and industry will bring you promotion. You have got as high as you can in the judicial scale. Like County Court Judges, you will have to stop where you are.' Unfortunately, the effect of such an appointment is not limited to the existing bench. Counsel of first-rate position and practice might hesitate to accept a judgeship of the High Court, but might resolve to accept it in the expectation of promotion to the Court of Appeal. That incentive is now gone; not without prejudice, in our opinion, to the future excellence of the bench."

The *Pall Mall Gazette* at first declined to credit the then rumoured appointment. After it had become certain, that influential journal thus commented:

"The surprise at Mr. Thesiger's appointment

but little exceeded the astonishment at the appointment being made from the bar at all. Scarcely any one had doubted that Lord Justice Amphlett's successor would be one or other of the judges of the High Court; and unless the new Lord Justice were to be chosen—which, perhaps, he should have been—from the Chancery Division, it was Mr. Justice Lush who was generally supposed to possess the highest claim to promotion. But there are several others who could be named as fitting successors to Lord Justice Amphlett, and whose appointment would fully have satisfied professional and public opinion. If, however, the Lord Chancellor intended to go further afield, if he intended to dispense with judicial experience and proved judicial capacity, it was at least expected that he would make an appointment which he could justify by the traditions reserving certain judicial prizes for important political service or distinguished forensic success. But these expectations have been altogether disappointed in the selection of a nominee who is neither fitted for the post by judicial experience, by reputed learning, or even by length of years; while he can put forward no compensating claim whatever on the ground of political service or professional distinction. A Queen's Counsel whose silk gown is four year's old, and its wearer only thirty-nine, and who has never in any way distinguished himself above his fellows, has been passed over the heads of twenty judges into one of the most important judicial offices in the State. Such an appointment appears inexplicable."

These views, so far as the cases are parallel, so exactly coincide with the opinions we have expressed in relation to the Constitution of our own Court of Appeal that we make no apology for calling attention to them. We are more and more satisfied that the system practically inaugurated when the Court was recently re-organised was a mistaken one and fraught with many perils to the efficiency of the Bench and to the maintenance of public confidence, though we admit there were then some difficulties to contend with.

SELECTIONS.

NEW TRIALS FOR FELONY.

Amongst many anomalies in our law, that of granting new trials is perhaps least capable of being upheld by logical reasoning, and yet is firmly supported by a powerful argument derived from the national love of justice. We have little doubt that our system of jurisprudence was once reproached for not permitting new trials, and the frequency of them now in turn sometimes becomes a subject-matter of complaint. The earliest reported case of a new trial is not of older date than 1648, although there is evidence of their having occurred in civil causes at a more remote period. In 1757 Lord Mansfield explained that the reason why they could not be traced further back was "that the old report-books do not give any account of determinations made by the Court upon *motions*;" and commenced his judgment on *Bright* v. *Eynon*, 1 Burr. 393, by saying: "Trials by jury in civil causes would not subsist now without a power *somewhere* to grant new trials. If an erroneous judgment be given in point of *law*, there are *many* ways to review and set it right. Where a Court judges of fact upon *depositions in writing*, their sentence or decree may, *many* ways, be reviewed and set right. But a general verdict can *only* be set right by a *new trial*, which is no more than having the cause more deliberately considered by *another* jury, where there is a reasonable doubt, or perhaps a certainty, that *justice has not been done*." Now, as Mr. Patterson has recently pointed out in his elaborate work on the "Liberty of the Subject," vol. i. p. 462, "the only legal mode of reversing the verdict of a jury known to the common law was by attaint, granted by the statutes of Edward II. and Edward III., the object of which was to rehear the case by means of a jury of twenty-four persons; the law considering that the oath of one jury should not be set aside by an equal number, nor by less than double the former. If the second jury agreed, the verdict was confirmed; if otherwise, the former verdict was annulled, and the first jury were convicted of perjury and false verdict." But, continuing the judgment above cited, Lord

Mansfield says: "The writ of attaint is now a mere *sound* in every case; in *many* it does not pretend to be a remedy. There are numberless *causes* of false verdicts, *without* corruption or bad intention of the jurors. They may have heard too much of the matter before the trial, and imbibed prejudices without knowing it. The cause may be intricate; the examination may be so long as to distract and confound their attention. Most general verdicts include *legal consequences* as well as propositions of fact; in drawing these consequences the jury may mistake, and infer directly contrary to law. The parties may be surprised by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. If *unjust* verdicts, obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property, on this method of trial, would be very precarious and unsatisfactory. It is absolutely *necessary to justice* that there should upon many occasions be opportunities for *reconsidering* the cause by a new trial."

These observations seem equally applicable to *all* trials by jury. Some forty years after the decision above referred to, we find Lord Kenyon, C. J., declaring judicially from the Queen's Bench that "in *misdemeanours* there is no authority to show that we cannot grant a new trial in order that the guilt or innocence of those who have been convicted may be again examined into." But "in one class of offences, indeed," said his lordship, "those greater than misdemeanours, no new trial can be granted at all" (*Rex* v. *Mawbrey and others*, 6 T. R. 638); and up to the year 1851 no single case is reported in which even an application for a new trial in *felony* had been made. Yet, strange as it may seem, the Court of Queen's Bench at that date actually granted a new trial in a case where an indictment for felony had been removed from sessions by *certiorari* and tried at York Assizes (*Regina* v. *Scaife*, 17 Q.B. 238). Of three prisoners the jury convicted two apparently guilty, and acquitted one against whom the evidence would seem to have been more conclusive. "In the following term a rule *nisi* was obtained for a new trial, on the grounds of improper reception of evidence and misdirection. The case was argued at some length; and neither in the course of the argument, nor in the judgments which followed, was a syllable uttered on the point now in question; the attention both of the counsel and the judges seems to have been exclusively confined to the questions of evidence and misdirection; but after the judgments pronounced making the rule absolute this occurred: The counsel for the rule suggested that there was a difficulty in ascertaining what rule should be drawn up, 'no precedent having been found for a new trial in felony.' Upon which Lord Campbell is reported to have said: 'That might have been an argument against our hearing the motion.' Still, however, the rule was made absolute, and a new trial, in fact, took place." This account of the proceedings is extracted from the judgment delivered by Sir John T. Coleridge in the case of *Regina* v. *Bertrand*, before the Privy Council (1867), where they were carefully considered, after which the learned judge continued: "It appears, then, from this examination of the case that a most important innovation in the practice of our criminal law was here made without a word of argument at the bar upon it, or the attention of the Court having been for a moment addressed to it, until after the opinions of all the judges had been expressed on the point really debated. And the decision has taken no root in our law, and borne no fruit in our practice." Sir John Coleridge intimated that the Lords of the Privy Council felt at liberty to disregard it; and then reviewed the arguments adduced in favour of the principle of extending the practice of new trials, viz., the improvement of justice, "that new trials had commenced in civil matters, and advanced in them gradually, and upon consideration, from one class of cases to another; that thence they had passed to criminal proceedings, first where the substance was civil, though the form was criminal; and thence to misdemeanours, such as perjury, bribery, and the like, where both form and substance were criminal. Hitherto it was admitted that they had, except in the instance of *Regina* v. *Scaife*, stopped short of felonies, but that the principle in all was the same; and that, where there was the same reason, the same course ought to be permitted. There may be much of truth in

this historical account," said the venerable member of the Privy Council; "and, if their lordships were to pursue it into details, it might not be difficult to show how irregular the course has been, and what anomalies, and even imperfections perhaps, still remain. But they need not do this; it is enough to say they cannot accept the conclusion; what long usage has gradually established, however first introduced, becomes law; and no Court, nor any more this committee, has jurisdiction to alter it; but, on the same principle, neither the one nor the other can, in the first instance, make that to be law which neither the Legislature nor usage has made to be so, however reasonable, or expedient, or just, or in analogy with the existing law it may seem to be."

Rejecting many suggestions which present themselves to our mind in favour of new trials in felonies, and as many or more opposed to an extension of the law in this direction, let us rather, as we have heretofore sought to do, cite authorities on the subject. Of scarcely less weight than a judicial opinion is that expressed by so able a writer on jurisprudence as Sir J. Fitzjames Stephen, who fully considered the present subject at the time of the celebrated case of Thomas Smethurst, of which he says, with pointed truth: "The trial at any time would have excited great public attention; and, as it took place in the latter part of August, after Parliament had risen, it excited a degree of attention altogether unexampled. The newspapers were filled with letters upon the subject, and one or two papers constituted themselves amateur champions of the convict, claiming openly the right of what they called popular instinct to overrule the verdict of the jury" ("General view of the Criminal Law of England," p. 425). The charge was murder by poison. There was reason to think that the scientific evidence on two important points was left in an unsatisfactory condition at the trial. Sir George Lewis, the then Secretary of State, referred the whole matter to the most eminent surgeon of the day—Sir Benjamin Brodie—who stated his opinion, founded by no means exclusively on medical or scientific reasons, that there was not absolute proof of the convict's guilt.' This opinion was submitted to the Lord Chief Baron Pollock, who had tried the case, and Smethurst received a free pardon." Deeming this result unsatisfactory for reasons given, Sir Fitzjames Stephen attributes it to defects in the law, and discusses what they are, and how they may be remedied. "Criminal and civil procedure," he says, "would be placed on the same footing by giving the Superior Courts the right to hear motions for new trials on the same terms in criminal as in civil cases. There are several strong reasons for not taking such a course. Important and true as it is that criminal trials are thrown into the shape of private litigations, it is equally true and important that they are in substance public inquiries." He asserts that a higher degree of evidence is required to warrant a verdict of guilty than (in general) to warrant a verdict for the plaintiff, asks, "How could a Court of law say in what cases the jury ought to have doubted?" and points out the "essential distinction between civil and criminal proceedings, strong as the outward resemblance between them may be. The object of the one is to give fair play to litigants in the attack and defence of their existing condition. The object of the other is to ascertain the truth. Granting new trials is well adapted to secure the first object, but has no tendency to secure the second." A more powerful argument, which we think discloses the cause why new trials for felonies have not been clamoured for centuries ago, is that, "in criminal cases, the Crown is bound by an acquittal as much as the prisoner by a conviction. After a verdict of not guilty, a man might leave the dock with impunity, boasting openly of having committed the foulest murder. After a verdict of guilty, he might be condemned and executed, though others might confess their guilt and be condemned and executed on that confession. This shows that, if the prisoner is to be allowed to move for a new trial, the same right ought, for the sake of consistency, to be given to the prosecutor; but there would be great objections to this. It would shock the sentiment which dictated the maxim *non bis in idem*, and on which, by our own law, the right to plead *autrefois acquit* is founded. Considering the suspense and distress of mind which a criminal prosecution causes, this sentiment is probably rational, though the rule which is founded

on it is a rough expedient. These reasons appear to me to show that the right to move for a new trial in criminal cases would not supply the defects of the present state of things, and would probably introduce new evils. It would extend too far the litigious theory of criminal justice which already exercises quite influence enough on our law." The learned writer next asks: "Ought we, then, to institute a Court of Appeal?" and pointing out that criminals would exercise the right of appeal in almost every serious case if it were only to delay the execution of their sentences, and that the effect would be the practical abolition of trial by jury, and that jurymen's sense of responsibility would be greatly diminished, he answers the question in the negative, and says that "what is really required is a check upon the miscarriages which, in very peculiar and intricate cases, are produced by the application of that mode of inquiry which is found to be most efficient in common cases. The necessity for this check is admitted by the supervision actually exercised over the verdicts of juries by the Home Secretary. Indeed, the existing practice not only admits the evil, but provides a remedy, right in principle, though administered in an inconvenient and objectionable manner. The principle is right, because it leaves the discretion of permitting an appeal in the hands of the Government. The mode of administration is wrong, because under it a function which is really judical is discharged by an irregular, irresponsible, and secret tribunal, consisting of a single statesman who has no special acquaintance with law and no judicial experience, who can neither examine witnesses nor administer oaths, and who consummates an irregular procedure by pardoning a man for guilt on the ground of his innocence." Sir Fitzjames Stephen then proposes that the Legislature should establish a Court and procedure much resembling that improvised the other day by the present Home Secretary, with the addition only of argument and publicity. "In order to protect the constitutional authority of the jury, it would be necessary to provide expressly, as a condition precedent to the summoning of the Court, that the Secretary of State should certify that new evidence had been discovered, or that the judge should certify that he was dissatisfied with the verdict." . . . "This improvement," the author adds, "would leave one considerable abuse unaffected; it would provide security against wrong convictions but not against wrong acquittals;" and he suggests that the judge at the trial ought to have the power of requiring material witnesses, not placed in the box by counsel, to be called, and, if necessary, of adjourning the case till they were produced, and discharging the jury from giving a verdict on insufficient evidence.

To solve the problem as to the expediency of new trials for felony, it seems to us necessary only to reconcile the following propositions: Fiat justitia, ruat cælum; Interest reipublicæ ut sit finis litium; Nemo debet bis vexari pro unâ et eadem causâ; and "an Englishman should be tried by his peers."*—*Law Journal.*

REHEARINGS IN CRIMINAL CASES.

The Home Secretary has advised the Crown that Louis Staunton, Patrick Staunton, and Elizabeth Staunton should undergo penal servitude for life, and that a free pardon should be granted to Alice Rhodes. So ends the famous Penge case, which perhaps has proved of some practical utility, directing attention to the question of rehearings, appeals, or new trials in criminal cases. It is remarkable that, often as the subject has been discussed, it has never been more fully comprehended; and therefore the evils which arise and the difficulties which beset it have never been understood. One proof of

* It is announced in the English newspapers that a bill will be brought before the British Parliament next session for the formation of a Court of Criminal Appeal. Sir Eardley Wilmot, M. P., formerly a County Court Judge, at Bristol, proposes in this bill that appeals shall be permissible only in cases of capital sentence, and that a prisoner condemned to death may appeal by himself or through his solicitor for a remission of his sentence, the court to consist of the three chiefs of the High Court of Justice, the three senior judges, and the Home Secretary, five to form a quorum. The Court may hear counsel for the prisoner and for the Crown, the expense of both counsel to be defrayed by the State, and the judgment of the court shall not be valid unless arrived at by at least two-thirds of its members. We much doubt the wisdom of this move.—Eds. L. J.]

this is that the phrases 'appeal,' 'new trial,' and 're-hearing' are used indiscriminately; as if they indicated the same or or similar things, whereas they all indicate things essentially distinct. The distinction between an appeal and a rehearing, as Lord Langdale once had occasion to explain, is that an appeal is on the *same evidence* to a *different tribunal*; while a rehearing, as often happened in Chancery, may be before the same judge on different or additional evidence. Again, a new trial is, of course, applicable to trial by jury, and means a trial by a different jury; of course, on oral evidence, whether of the same or different witnesses. And here arises the great difficulty as to rehearings of criminal cases, that trials must be by oral evidence, before a jury, on the ground that evidence is not reliable unless given openly, and tested by cross-examination; and that new trials would cause such delay as to interfere with the due administration of criminal justice; while, on the other hand, the mere reconsideration of the evidence, or rather of the notes of the evidence, by a judge or any other authority, is reviewing the decision of a tribunal which had all the advantages of seeing and hearing the witnesses, by the opinion of persons *without* those advantages. On questions of *law* this is not material, as the facts are not in doubt; and, accordingly, many years ago, judges at criminal trials were allowed to reserve cases, on points of law, for the decision of the judges in the Court for Crown Cases Reserved. And, by a very anomalous and unobserved usurpation of the judges, the question whether there was any evidence to sustain a conviction—though this must depend on the weight and effect of the evidence given—and that is avowedly for the jury—is regarded as a question of law which may thus be reserved; so that if the counsel for the accused in the Penge case had thought that any judge could have doubted that there was sufficient evidence to sustain a verdict of guilty, they might have asked the judge to reserve that question. But the difficulty is as to the *facts*; as to which it has always been considered a general principle that the evidence of persons who might have been called as witnesses at the trial, and were not called, is not to be regarded. Hence, in civil cases—in which new trials are allowed—it has long been established as a rule that a new trial is not to be granted on account of evidence of persons who might have been called at the trial. The reason of this rule is that it would be dangerous to allow parties to keep back evidence, and then bring it forward as a reason for a new trial. On a new trial all is left at large again; everything has to be re-proved by legal evidence; and there may be a failure of justice on the second trial through a failure of proof—by the death or absence of a witness, or loss of a document—on points not at all in dispute at the first. Consequently, as every additional trial involves a fresh risk of failure of justice, a party is not allowed to have a new trial in order to give evidence which he might have given at the first trial. Therefore, if new trials were allowed in criminal as in civil trials, no new trial could be allowed in the Penge case, for no evidence is suggested which might not have been given at the former trial. A medical witness was present for the defence at the inquest, and was not called at the trial. Any number of medical witnesses might—in accordance with a well-known rule—have been qualified as witnesses, and called as witnesses, simply by having them in Court to hear the evidence. Clara Brown was called for the prosecution, and might have been cross-examined to show that food was supplied to the deceased, or that she was not secluded. Neither the prosecution nor the prisoners, therefore, could be entitled to a new trial. And then the great difficulty arises, that it is unsatisfactory to review and reverse the verdict at an open trial by the opinion of any parsons, either on the same evidence or on additional evidence, given secretly, and such as might have been given openly at the trial. The difficulty was illustrated a few years ago in an appeal to the Judicial Committee from a decision of the Court of Arches against a clergyman, for immorality. The judge, who saw and heard the witnesses, decided against him. The Court of Appeal, who only had written notes of the evidence, reversed his judgment. In another and similar case, in which, also the clergyman had been convicted, the Judicial Committee, very properly, had the witnesses before them, and *confirmed* the conviction. On an appeal to quarter sessions—which partakes of the character

of a rehearing and new trial, the magistrates acting as a jury—additional evidence on either side may be adduced; but the witnesses are examined openly and orally in Court as before a jury, and the whole case is reconsidered, and reconsidered as a whole This is most essential in criminal cases, especially in such as turn at all on medical evidence. For such evidence is never in itself conclusive either way; unless, indeed, it shows that the person died a natural death or a death from disease unaccelerated by any criminal act. Ordinarily, the medical evidence only shows that the death is *consistent* with the result of the criminal act; and, accordingly, in the Penge case, the medical witness for the defence was cross-examined as to whether the indications were not *consistent* with death from starvation, and admitted that they were. Whether, in fact, the death was caused by starvation depended on the whole of the evidence; unless, indeed, it was shewn by the medical evidence that the death was not so caused, which of course could not be shewn if, as admitted by the witness for the defence, the indications were *consistent* with death from starvation Hence it is shewn that the case, to be satisfactorily renewed, would have to be reconsidered as a whole; and *either* on the same evidence, *or* on that evidence and other evidence given under the same conditions openly, and subject to cross-examination. It may be laid down broadly that no opinions are worth anything which are not given subject to cross-examination. It is a common artifice of astute attorneys to *keep back* their evidence in a criminal case, suspecting it may break down on cross-examination; reserving it for subsequent appeals, when it cannot be so tested. There is a general feeling that this is very unsatisfactory. It is worse—it endangers the interests of justice. It would not be allowed in a civil case, and it is perilous to allow it in a criminal case. On an *appeal*, no additional evidence is allowable; and hence the Judicature Act provides that appeals should be by way of rehearing so as to *admit* additional evidence; but then it is at the discretion of the Court to admit it, and they do not admit it if it *could* have been given at the former hearing; and *if* they allow it, the evidence is given subject to cross examination. In a criminal case this is the more necessary because the case for the prosecution is known long before the trial; and thus in the Penge case the medical evidence was given at the inquest, and known to the prisoners, who had the trial postponed expressly to afford them the opportunity of meeting it. If, therefore, either an appeal or a new trial were allowable in a criminal case, it would not be available. And in the Penge case the mischief of allowing any force to *ex parte* statements after the trial was strongly illustrated. The medical men who wrote in the papers, having been present either at the *post-mortem* examination or at the trial, dealt only with a portion of the medical evidence, grossly misrepresented it, and never dealt with the strongest part of the evidence. It is satisfactory, at all events, that there has not been a *total* failure of justice.—*The Law Journal.*

CHATTEL MORTGAGES OF THINGS NOT IN ESSE.

The question whether a thing not *in esse*, such as an unplanted crop, may be the subject of a chattel mortgage, has been fruitful of much discussion, and there has been considerable contrariety of decision, the tendency of late being to sustain mortgages given upon such property, at least to the extent of a single crop. The case of *Dupree* v. *McClanahan*, recently decided by the Court of Appeals of Texas, involves the question, and the conclusion is in accordance with the tendency mentioned. In *Wyatt* v. *Watkins*, 16 Alb. L. J. 205, the same result is reached. Parsons, in his work on Contracts, states as a general principle (pp. 522, 523): "The existence of the thing sold, or the subject-matter of the contract, is essential to the validity of the contract," and, "a mere contingent possibility, not coupled with an interest, is no subject of sale, as all the wool one shall ever have, or the sheep which a lessee has covenanted to leave at the end of an existing time." But if "rights are vested, or possibilities are distinctly connected with interest or property, they may be sold." And it is said in Benjamin on Sales, p. 53: "Things not yet in existence, which may be sold, or those which are said to have a potential existence,

that is: things which are the natural product or expected increase of something already belonging to the vendor." In *Jones* v. *Richardson*, 10 Metc. 481, it is held that a mortgage upon goods which the mortgagor does not own at the time the mortgage is made, though he afterward acquire them, is void, the court saying that to be able to sell property, the vendor must have a vested right in it at the time of sale. See, to the same effect, *Rice* v. *Stone*, 1 Allen, 566; *Head* v. *Goodwin*, 37 Me. 181; *Low* v. *Pew*, 108 Mass. 347; 11 Am. Rep. 357, where a sale of fish, thereafter to be caught, was held to pass no title to the fish when caught. *Wilson* v. *Wilson*, 37 Md. 1; 11 Am. Rep. 518, where a sale, for a valuable consideration, of all the property the vendor then had and might thereafter acquire, was held to convey only such property as the vendor then possessed. See, also, *Moody* v. *Wright*, 13 Metc. 17; *Holroyd* v. *Marshall*, 10 H. of L. 191; *Brown* v. *Tanner*, L. R., 3 Ch. 59; *Pennock* v. *Coe*, 23 How. 177; *Galveston R. R. Co.* v. *Cowdy*, 11 Wall. 489; *Morrill* v. *Noyes*, 56 Me. 458; *Pierce* v. *Lang*, 32 N. H. 484; *Phelps* v. *Winslow*, 18 B. Monr. 431; *Arnoult* v. *Aimes*, 16 La. Ann. 225; and cases cited in *Wyatt* v. *Watkins*, *supra*.—*Albany Law Journal*.

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(Reported for the *Law Journal* by H. T. Beck, M.A., Student-at-Law.)

Bridges v. Douglas.

Prohibition—Division Court—Jurisdiction.

When the holder of a promissory note, payable to "A. B., or bearer," endorsed it over to a third party.

Held, that under C. S. U. C. cap. 19, sec. 71, an action might be brought against the maker and endorser in the Division Court for the division in which the endorser resided, and that in a motion for a writ of prohibition, the question, whether or not the endorsement was made for the purpose of giving jurisdiction cannot be enquired into.

[January 24.—Morrison, J.]

This was a summons calling upon the Judge of the County Court of the County of Bruce, *ex officio* Judge of the First Division Court of the said county, the clerk and bailiff of the said Division Court, and one George Bridges, plaintiff, in a suit in said Division Court, wherein said Bridges was plaintiff, and Alexander Douglas and Thomas Dixon were defendants to shew cause why a writ of prohibition should not issue to prohibit said judge, clerk, bailiff and plaintiff from further proceedings in said suit upon the ground that the said Court had no jurisdiction to try the case; that the defendant Douglas did not reside within the said division, and that the cause of action against said Douglas, if any, did not arise within said division; and that said Douglas and Dixon were improperly joined as defendants in the same suit, and that the suit was substantially the suit of the defendant Dixon and not of the plaintiff; and that Dixon was not really a defendant in the suit, but the form of endorsing said note was gone through with to give the appearance of said Dixon being liable as a defendant, and to enable him to have the action brought against himself, and the substantial defendant in the division in which said Dixon resided, under C. S. U.C. cap. 19, sec. 71.

The Judge in the Division Court found that the endorser took the note *bonâ fide* before due, and that the endorsement to the plaintiff was also *bonâ fide*; stating further, that the question as to whether the endorser endorsed the note with a knowledge that he was giving a jurisdiction where none existed before was immaterial. He also held that the parties could be sued jointly, and therefore gave judgment for the plaintiff, upon which the defendant Douglas made this application.

A. Cassels, showed cause.

W. S. Smith, contra.

Morrison, J.—On this application I cannot consider the motion of the defendant Dixon, and in endorsing the note as endorser on the note, he was liable to be joined as a defendant in the suit, and that being the case, sec. 71 of the Division Court Act gives jurisdiction to the Division Court for the division in which either defendant resides to try the case. The summons must be discharged, but, under the circumstances, without costs.

CHANCERY CHAMBERS.

Re Jack, Jack v. Jack.

Administration.

Held, following *Re Shipman*, (*ante infra* p. 17), that an administratrix has no right to an administration order on merely shewing that the intestate's liabilities are in excess of his personal estate, she having now a valid defence at laws to any action on the part of a creditor.

[November 5.—Proudfoot, V.C.]

This was a motion for an administration order on behalf of an administratrix, it being alleged that the personal property of the deceased was insufficient to satisfy the intestate's debts.

H. M. Howell, for the administratrix, submitted, that the decisions in *Swetnam* v. *Swetnam*, 9 C. L. J. 161, 10 Ib. 135, and *Re Ette*, 6 Prac. R. 159, were opposed to *Re Shipman*, ante, and that the latter case should not be followed. The case of *Doner* v. *Ross*, 19 Gr. 229, shows that the law was not altered by the A. J. Act, so as to affect the liability of an administratrix as stated in the reasoning given in the judgment in *Re Shipman*.

Hoskin, Q.C., for infants, relied on *Re Shipman*.

Proudfoot, V.C., thought that he could not review the decision of V. C. Blake, in the case cited; the only course was for the applicant to appeal if dissatisfied. The case was, however, allowed to stand over by consent in order that the application might be renewed on behalf of a creditor.

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH.

IN BANCO, June 30.

BOLEY v. McLEAN.

Consol. Stat. U. C. cap 93, secs. 6-8—Survey under.

A surveyor employed by the Government, under Consol. Stat. U. C. cap. 93, secs. 6-8, to survey a concession line alleged to have been run in the original survey, or to have been obliterated, instead of attempting to make a survey in accordance with those sections, satisfied himself that the original line could be found, and endeavoured to retrace it.

Held, following *Tanner* v. *Bissell*, 21 U. C. R. 553, that such survey was not binding under the statute; and the Court, on the evidence given at the trial, affirming the finding of the learned Judge, who tried the case without a jury, that the line so run was not in fact the same as the original line.

Semble, that in order to prove a survey which will be conclusive under the statute, the application by the County Council to the Government for such survey must be shewn.

Douglas, for plaintiff.

Robinson, Q.C., for defendant.

THOMSON v. FEELEY.

Agreement by secretary of proposed company—Personal liability—Equitable defence—Pleading.

The plaintiff sued defendant on an alleged agreement, that in consideration, that the plaintiff would make a promissory note, payable to the defendant's order, for $500, and delivered it to defendant to be negotiated, defendant promised that the plaintiff should, at any time before the maturity of the note, have the option of subscribing for one share of $500 in a company to be incorporated under "The Ontario Joint Stock Letters Patent Act, 1874," and called the Aldershott Match Company; and that, if the plaintiff should before such maturity decline to take said share, the said company would take up the note and indemnify the plaintiff against it. The declaration averred that the plaintiff delivered the note to defendant, who negotiated it, that before its maturity the plaintiff declined to take the share, and so notified defendant, but that neither the defendant nor the company took up the note, and the plaintiff had to pay it.

Defendant pleaded, on equitable grounds, that he was one of the projectors and secretary of said company, and as such before the issue of the Letters Patent applied to the plaintiff to take a share, which the plaintiff agreed to do on the terms of the following receipt then given by him to defendant:

"Hamilton, 13th April, 1876.

"Mr. Thomson has given me his note for $500 for one share in the Aldershott Match Company, which he has the privilege of declining at the expiry of the note; and, if so, this company will take up the note.

"C. Feeley, *Secretary*."

That defendant then gave his note accordingly: that afterwards the company was incorporated: that the defendant was a shareholder and the secretary, and in that capacity only endorsed the note to the company, which accepted it on the terms of the receipt and discounted it: that before its maturity the plaintiff notified the company that he declined to take the share, but afterwards withdrew such notice and paid the note at maturity, and was treated as a shareholder, and voted and acted as such at meetings of shareholders: that it was not the intention of either plaintiff or defendant that defendant should be personally bound by the receipt, or in respect of said note or share, but they both intended that the plaintiff should look only to

the company in his dealings under the receipt in respect of said share, and defendant was described in the receipt as secretary, in order to exempt him from personal liability, and he denied any fraud (which was charged in the second count) and denied that he contracted with the plaintiff as alleged.

Held, that the defendant was *prima facie* personally liable, there being at the time when he signed the receipt no company, and therefore no principals whom he could bind.

That part of the plea was proved, alleging the intention of the parties to have been that defendant should not be personally bound by the receipt, but that the plaintiff should look only to the company.

Semble, that this could form no defence, being in contradiction of the written agreement; but the parties having gone to trial on the plea, and there being a verdict for the plaintiff, the verdict was ordered to be entered for defendant on that branch of the plea, and the plaintiff left to move in arrest of judgment, unless defendant should elect to amend his plea.

Suggestions as to a form of plea which might shew a good defence.

Ferguson, Q.C., for plaintiff.

E. Martin, Q.C., for defendant.

Fenton v. McWain.

Tax sale—32 Vict. cap. 36, O.—Omission to return list under sec. 110—Effect of secs. 130, 155.

Land was sold in January, 1871, for an arrear of taxes assessed in 1867, under a warrant for sale, dated 20th August, 1870. The land was put on the non-resident in place of the resident roll, and the list of land liable to be sold, required by the 32 Vict. cap. 36, sec. 128, O., to be sealed with the corporate seal and signed by the warden, and to be returned to the treasurer with the warrant for sale annexed, was not so sealed, or signed, or annexed. *Held*, that the land could be sold under the 32 Vict. cap. 36, sec. 128, at any time after the taxes had been due for more than three years at the time of the warrant, as they were here; and that the placing the land on the wrong list, and the omission to authenticate and return the list, were defects cured by sec. 155—more than two years having elapsed before this suit since the execution of the tax deed.

No list was returned by the treasurer to the clerk of the land on which three years' taxes were in arrear, as required by sec. 110; and sec. 131 enacts that the treasurer shall not sell any lands which have not been included in such lists. *Held*, therefore, that the sale in this case was unauthorized, and that it was not made valid by secs. 130 or 155.

Robertson, Q.C., for plaintiff.

M. C. Cameron, Q.C., for defendant.

Writt v. Sharman et al.

Lease—Construction—Allowance out of rent.

The plaintiff leased a tavern to defendant for three years at a rent of $400 a year, payable quarterly, "the said lessor to allow the said lessee the amount he has to pay as license fees out of the first quarter's rent in each year." The license fee when the lease was executed, and for some years previously, was $85, but in the following year it was raised to $200. *Held*, that the lessee could claim no allowance beyond the first quarter's rent, the lessor being bound to allow the fee only, provided it did not exceed such rent.

Robinson, Q.C., for plaintiff.

M. C. Cameron, for defendant.

O'Callaghan v. Cowan et al.

Division Court executions—Interpleader—Insolvency proceedings—Priorities.

The bank, the three defendants C., and the defendant R., each had executions in the Division Court against one D., in the hands of defendant Cowan, as bailiff, who seized the goods in question in July, 1875, and advertised them for sale. One O'C. gave notice of claim, and there was an interpleader between him and the bank, on which judgment was given on 30th November, 1875, against the claimant.

On 15th November an attachment in insolvency issued against D., the execution debtor, and the official assignee gave notice thereof to the bailiff, defendant Cowan, who on the 4th December, being indemnified, sold the goods. The plaintiff claimed as a purchaser from O'C., who claimed under a chattel mortgage from D., dated 25th January, 1875, and obtained the goods on 27th November, 1875, from the official assignee, who knew nothing of the interpleader, and sold them to the plaintiff, from whom the bailiff took them.

Held, that as between the plaintiff and the execution creditors, the plaintiff by the interpleader judgment was postponed to them. And that while the plaintiff might rely upon the insolvency proceedings, and the claim of the assignee as superseding the executions, and re-establishing his own claim, the execution creditors, in support of their earlier profession, might set up the *jus tertii* and shew the mortgage to be void as against the official assignee.

Ferguson, Q.C., and *Norris*, for plaintiff.
S. Richards, Q.C., *Read*, Q.C., *Osler*, and *Wells*, for defendants.

Kerr v. Hastings Mutual Fire Ins. Co.

Fire policy—Assignment after loss—Representation as to value and title.

An assignment of a claim to compensation under a fire policy, after the loss has occurred, is not a breach of the ordinary condition against assigning without license of the insurers; but the safer form of transfer is to assign only the money payable in respect of the loss, and not the policy, especially if the loss is partial only, and less than the sum insured.

The application for the policy described the stock in trade to be worth $5,000, and the ownership of the goods was stated to be in the two Messrs. R., whereas the value was only $3,500, and the stock only belonged to the two, the rest of the property belonged to them in separate portions, and part to the wife of one.

The statements in the application were declared by the insured to be "a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to me and are material to the risk. And I hereby agree and consent that the same shall be held to form the basis of the liabilities of said company, and be binding upon me as material representations in reference to the insurance to be granted hereon." It was left to the jury to say whether the insured made any misrepresentation or misstatement in the application for insurance, or any fraudulent claim against the company, and they answered in the negative.

Held, that the whole declaration was qualified by the words "so far as the same are known to me and are material to the risk;" that the question asked of the jury was substantially a question whether the value was stated by the assured truly so far as known to him; and that on the evidence their finding could not be disturbed.

Held, also, that the words "in regard to the condition, situation, value and risk of the property to be insured" did not apply to the goods being joint or several property, and that it was not material to the risk. An allowance of $200 was made to the defendants under a condition that in case of the removal of property to save it the defendants would contribute rateably with the assured and other companies interested to the expenses of salvage, and the damage sustained by the removal.

E. Martin, Q.C., for plaintiff.
G. D. Dickson, for defendants.

EASTER TERM, June 30.

Regina v. Roddy.

36 Vict. cap. 10, sec. 4, O.—What is a "crime."

An information under 37 Vict. cap. 32, sec. 28 and 34, O., for selling intoxicating liquor on Sunday, was held to be so far a charge of a criminal nature, that defendant could not be compelled to give evidence against himself under 36 Vict. cap. 10, sec. 4, which authorizes such evidence in a matter "not being a crime." The conviction in this case was quashed, because obtained on defendant's evidence.

36 Vict. cap. 10, sec. 4, is not repealed as to proceedings under the Tavern and Shop Licences Acts, by 37 Vict. cap. 32, O.

Grover, for the Crown.
Bethune, Q.C., and *Watson*, for defendant.

Hickey v. Fitzgerald.

Action of assault—Evidence.

A number of people, including the plaintiff and defendant, had formed a ring for the purpose of witnessing an expected fight between two persons, one of whom was plaintiff's nephew. The plaintiff, when going towards the combatants, was assaulted by defendant, who got into a fight with him and bit his hand severely. Defendant's counsel proposed to ask the plaintiff on cross-examination as to a number of former fights in which he was said to have been concerned, but the learned Judge refused to allow this, the counsel being unable to state that it was intended for the purpose of testing the plaintiff's credibility. The evidence as to the defendant's purpose in interfering with the plaintiff was contradictory, and the jury were told that if defendant's object was only to prevent the plaintiff from interfering with the fight, and not to prevent a breach of the peace, he was a wrong doer.

Held, that the evidence was rightly rejected, and the direction right; and a verdict for the plaintiff was upheld.

The erroneous exercise of discretion in refusing to allow questions on cross-examination which are irrelevant to the issue, would be no ground for a new trial.

Lount, Q.C., for plaintiff.
McCarthy, Q.C., for defendant.

McDougall v. Campbell.

Counsel fees—Right of action for—Bill for divorce and alimony.

Held, (Harrison, C. J., dissenting), that counsel in this Province have the right to maintain an action for their fees.

Defendant having presented a bill to the Senate for a divorce from his wife, the plaintiff was retained by the wife as counsel before the committee of the Senate to oppose the bill. The defendant being informed that he must pay from day to day into the committee the costs of his wife's defence, promised the plaintiff that if plaintiff would not insist on defendant so paying these fees, he would pay them to the plaintiff when taxed. The committee having reported the preamble of the bill not proved, the wife applied to the Senate for a divorce and for maintenance, and retained the plaintiff to support such application.

Per Wilson, J.—(1.) The Senate could have no power to award alimony, and the plaintiff could not recover for his fees in promoting a bill for that purpose. (2.) If counsel fees could not be recovered by a counsel from his client, the plaintiff here could not recover upon this express contract. (3.) The Court upon such express agreement, set out in the judgment, sufficiently shewed a right of action in the plaintiff against the defendant.

Spencer, (*J. Macdougall* with him), for plaintiff.

Bethune, Q.C., contra.

EASTER VACATION.

Caspar v. Krachie.

Reviving judgment over 10 years old—Statute of Limitations.

Oct. 25.] [Wilson, J.

A judgment over 10 years old, which has not been acted on within that time, and on which no payments have been made, cannot be revived since the late Statute of Limitations of Ontario. In this case the defendant did not oppose a motion to revive in chambers, and took no steps to set the order aside for several months when execution was about to be enforced. The Judge refused to set the order to revive aside, owing to the conduct and delay of the defendant.

Nugent, for plaintiff.

G. B. Gordon, for defendant.

MICHAELMAS TERM, November 19.

Patterson v. Smith.

Lease—Estate for life—Denying lessor's title.

H., who had a life estate in certain lands, leased it for his life to defendant, one A. P., husband of plaintiff, claiming it as reversioner of H., sold the land and lease, etc., to one S., who sold to plaintiff. Plaintiff also bought the land at a sheriff's sale under an execution against A. P., at defendant's suit, in an action for 6 years rent. *Held*, that defendant might shew that his lessor's title ceased with his death, and that he was relieved from the estoppel which bound him during the lessor's life time.

Armour, Q.C., for plaintiff.

Robinson, Q.C., contra.

Marshall v. Jamieson.

Contract to deliver wheat—Failure to find cars.

Action for damages for non-delivery of wheat to plaintiff, purchased by him from defendant.

Held, that the letters and telegrams in this case shewed a completed contract.

Held, also, that the rule which applies to sales, f. o. b., on vessels, applies also to shipments, f. o. b., by rail, and that it is the duty of a vendee buying, f. o. b., to furnish the cars.

Held, also, in this case there was no sufficient evidence of a local custom making it the seller's duty to supply the cars; and

Quære, how far such a local custom would be allowed to prevail against the general rule.

Osler, for plaintiff.

C. Robinson, Q.C., for defendant.

Bartels v. Bartels.

Will, construction of—Estate for life.

J. B. devised his land, including the homestead, in fee to his sons, "subject to the following conditions, that my beloved daughters . . . shall have at all times a privilege of living on the homestead and maintained out of the proceeds of the said estate during their natural lives."

Held, that the words, "shall have at all times a privilege of living on the homestead," etc., gave the whole homestead to the daughters as a home during their lives; and that the words, "shall be maintained out of the *said* estate," meant all the estate, real and personal, mentioned in a former part of the will and not the homestead merely.

Reeve, for plaintiff.

Wallbridge, Q.C., for defendant.

Hughitt v. Saxton.

Foreign judgment—Proof of—Married woman.

A. and wife recovered a judgment for costs of defending a suit brought by defendant herein in the Supreme Court of New York to set aside a conveyance to the wife, A. being joined for conformity only.

Held, that the judgment was sufficiently proved by an exemplification certified by the clerk of the foreign court under its seal, it appearing by the certificate that the person signing was the proper clerk, and the seal was the proper seal.

A. and wife having assigned the judgment to plaintiff after A.'s assignment in insolvency, held a valid assignment for the judgment was in fact the wife's, and so was not affected by the husband's assignment in insolvency.

Reeve, for plaintiff.

Clute, for defendant.

Erb v. Great Western Railway.

Fraudulent bills of lading—Agency.

One C., general agent of defendants at Chatham, and partner of B. & Co., issued several bills of lading as follows: "Shipped by B. & Co., etc., 200 barrels flour to be delivered to" the plaintiffs at St. Johns, N.B. The bills of lading, shipping receipts with bills of exchange drawn by B. & Co. annexed, were discounted by B. & Co. at a bank, and the bank forwarded the bills of exchange for collection to plaintiff, who returned them. C. never, in fact, received any flour from B. & Co.

Held, (Harrison, C.J., dissenting), that defendants were not liable for C.'s acts, for they were not done in the course of his employment for them.

Per Harrison, C.J.—The plaintiff having acted in good faith with the person whom defendants appointed, and held out to the public as a proper person to deal with, should recover against the defendants.

The authorities as to the responsibilities of principals for the acts of agents collected and reviewed.

Bethune, Q.C., for plaintiff.

M. C. Cameron, Q.C., for defendants.

Clark v. Sarnia Street Railway Co.

Street railway—Contract not under seal—Ultra vires.

The plaintiff agreed with the defendants, a duly incorporated Street Railway Co., under a memorandum in writing, dated 18th April, 1875, not under seal but signed by the proper officers, to carry freight for defendants in his steam vessel along the line of their track—the railway not being completed till 5th July, 1875. Plaintiff carried freight during the season of 1875, and in the spring of 1876 demanded remuneration, when the manager repudiated all liability on behalf of defendants.

Held, that the company having reaped the benefit of the transaction would not be allowed to set up the want of the seal or of power in them to contract for the carriage of freight by water, and that the plaintiff was entitled to compensation for freights carried after 5th July, 1875.

J. K. Kerr, Q.C., for the defendants.

Mackenzie, (Sarnia), for plaintiff.

Beveridge v. Creelman.

Trespass to land—Dedication of highway.

In 1858, one G., a surveyor, under whom plaintiff claims, obtained a patent for the land in question, and which he had previously claimed to own. In 1857 he got up and presented to the Municipal Council a petition to open a road through his lot, as a continuation of R. street in Collingwood. The by-law was in November, 1857, and G. ran the line for the road, and the road was made. $200 being expended by the council, but not on G.'s land, where it was unnecessary. The road was used by the public as early as 1859 and 1860. G. never objected, though he placed a gate to keep cattle out of his fields, which were unfenced. Of subsequent owners of the land, some did not object to the use of the land, and others did, but none actively till the plaintiff. The road as used was not in one part of G.'s land in a line with R. street, owing to a ravine which the road followed round instead of crossing it.

Held, that G. had no power to dedicate before he obtained the grant, but that his acts subsequent thereto, did amount to a dedication.

Held, also, that the by-law established the road being passed at G.'s request.

Quære, if passed without that request, would it have done so.

J. K. Kerr, Q.C., for plaintiff.

McCarthy, Q.C., for defendant.

CHANCERY.

Attorney-General v. Walker.

V. C. B.] [Nov. 6.

Pleading—Practice—Jurisdiction—Rights of the Crown.

This was a suit instituted by the Attorney-General of the Dominion against the defendants

to enforce payment of the sum of $200,000 alleged to have been fraudulently retained by them, instead of having paid the same into the treasury of the Dominion for excise duties upon spirits manufactured by the defendants, and by them secretly disposed of. The defendants filed a demurrer for want of equity, contending that the proper Court for the Attorney-General to sue in was a Court of law, this being a legal demand, and there being no equitable circumstances connected with the claim in question requiring him to come into this Court.

BLAKE, V.C., before whom the demurrer was argued, held, however, that the Crown had a right to institute proceedings to enforce its claim in any of the Courts it might select, observing in his judgment that even "apart from the Administration of Justice Act I should be bound to hold, on authority, that the Crown is entitled in this Court to the relief it demands by the information filed in this cause." The 155 section of cap. 8, 31 Vict., provides that "all such duties and license fees shall be recoverable with full costs of suit, as a debt due to Her Majesty in any Court of competent civil jurisdiction." The Vice-Chancellor further observed that "under the section I think it is clear the Crown is entitled to call the defendants to an account, and that this may be done at any time after the duties ought to have been accounted for, whether the account has or has not been rendered—see *Regina* v. *Taylor*, 36 U. C. R. 1879. It is not necessary to consider whether the Crown can recover by the present proceeding all that is claimed or not. The House of Lords has laid down, in the case already referred to, *Corporation of London* v. *The Attorney-General*, that 'if there is any part of the case which would entitle the parties to a decree upon the facts stated the demurrer can not be supported. A demurrer to a bill on information, therefore, challenges the plaintiff to shew that he is entitled to some portion of the relief prayed according to the facts stated.' I think the demurrer should be allowed with costs."

REVIEWS.

MANUAL OF PROCEDURE IN THE SUPREME AND EXCHEQUER COURTS OF CANADA. By Robert Cassels, Jr., Advocate of the Province of Quebec, and Barrister of Osgoode Hall, and Registrar of the Courts. Toronto: R. Carswell, Law Publisher, 26 and 28 Adelaide Street.

This is a conveniently shaped little volume of good appearance, bound in red calf. There is an assumption about it, however, which leads to some disappointment on further investigation. It begins with a well written introduction which contains much information of interest to those who are not familiar with the history and scope of Exchequer jurisdiction and procedure in England, and then gives a resumé of the statutes and authorities on Exchequer jurisdiction and procedure in Canada, and a few observations as to Petitions of Right. The introduction, with a few unimportant notes and a full Index, is the only original matter in the volume. The various acts organizing and in any way affecting the Courts, beginning with the British North America Act, 1867, and ending with the Petition of Rights Act, 1876, are published *in extenso*. The price is $5.

DIGEST OF ONTARIO REPORTS. By C. Robinson, Q.C., and F. J. Joseph. Part XII.

This part begins with the conclusion of the title "Mortgage," and carries on the titles to "Partition." The cases on municipal law of course appear in this number, and contain fifty pages of matter, an appalling evidence of the amount of litigation connected with this branch of law. The analysis of these cases, as shewn by the headings, is very complete. Another important title in this part gives the cases as to New Trials. Under the title "Parliament" appear the now numerous decisions on Election law, including the trial of controverted elections. Every number increases the reputation of this excellent Digest.

ELEMENTS OF THE LAWS, OR OUTLINES OF THE SYSTEM OF CIVIL AND CRIMINAL LAW IN FORCE IN THE UNITED STATES. By Thomas L. Smith, late one of the Judges of the Supreme Court of Indiana, U. S. Philadelphia: J. B. Lippincott & Co. 1878.

This is the age of Elementary treatises. There is a mania for "smattering"—a desire to know something of everything—no desire to do any single thing as well as possible, or possibly a desire to do everything to perfection, and therefore

doing all imperfectly. An age to be hereafter known as that of the Jacks-of-all-trades. The only use of this book, "designed as a text book and for general use," as the title page says, is as a school book, and in this way it will doubtless have a ready sale, especially in the country where it is published.

CORRESPONDENCE.

Supreme Court.

To the Editor of the Law Journal.

Sir,—I see by the papers that Mr. Justice Strong has been given six months leave of absence from his duties at the Supreme Court, Ottawa. Doubtless there was a good reason for this, and I only mention the matter because there are several important cases from Ontario in which judgments are to be given, and others set down to be heard next January, and though we have the utmost confidence in the opinion of the learned Chief Justice, suitors, or at least their counsel, will not have the same confidence in some other members of the Court, who are not familiar with our laws. And the absence of so able a lawyer as Mr. Strong will weaken the effect of the decisions. I must regret, therefore, the necessity which compels it at the period I refer to. Yours, &c.,

Barrister.

Township Clerks and the selection of jurors.

To the Editor of the Law Journal.

Sir,—It appears that there are township clerks who reside and have their offices in other municipalities than those with which they are officially connected; and that the business of such municipalities is more or less transacted outside of the limits prescribed by law. For instance, the selection of jurors must take place *within the municipality*, and if this important duty is performed by the selectors outside of their own municipality, their whole proceeding is illegal, and the jurors so selected cannot be compelled to attend. This is one of the evils attending *absentee* officials for a township; they should be required to reside and have their office *within* the municipality, and the clerk (being a permanent officer, and reasonably paid) should be compelled to reside within a mile or two of the centre of the township, that all might have access to him on official business with as little inconvenience to the public as possible. It is not reasonable that rate-payers residing in the front concession of a township shall be compelled to travel between ten and twelve miles to the rear of the municipality to transact business with the clerk, and perhaps find his office locked and the officer away—thus necessitating another journey. A remedy should be at once found for this state of things, or confusion may arise in jury panels.

Yours, X.

To Correspondents.

We have received two letters from Equity men in answer to the communication signed "Q.C.," but they are too late for this issue. They will appear next month.

FLOTSAM AND JETSAM.

"Judge not, that ye be not Judged."—In the year 1683, as Jeffreys was making his northern circuit, he came to Newcastle-upon-Tyne. Here he was informed that some twenty young men of the town had formed themselves into a society, and met weekly for prayer and religious conversation. Jeffreys at once saw in these youths so many rebels and fanatics, and he ordered them to be apprehended. The young men were brought before his tribunal. A book of rules which they had drawn out for the regulation of their society was also produced, and was held by the judge as sufficient proof that they were a club of plotters. Fixing his contemptuous glance on one of them, whose looks and dress were somewhat meaner than the others, and judging him the most illiterate, he resolved

to expose his ignorance, and hold him up as a fair sample of the rest. His name was Thomas Verner. "Can you read, sirrah?" said the judge. "Yes, my lord," answered Mr. Verner. "Reach him the book," said Jeffreys. The clerk of the court put his Latin Testament in the hand of the prisoner. The young man opened the book, and read the first verse his eye lighted upon. It was Matt. vii. 1, 2: "*Ne Judicate, ne judicemini*," &c. "Construe it, sirrah," roared the judge. The prisoner did so: "Judge not, that ye be not judged; for with what judgment ye judge, ye shall be judged." Even Jeffreys changed countenance, and sat a few minutes in a muse; but instantly recovering himself, he sent the young men to prison, where they lay a year, and would without doubt have been brought to the scaffold, had not the death of the king, which occurred in the meantime, led to their release.—*From the "History of Protestantism," by the Rev. Dr. Wylie*, for October.

A very singular case was brought to the attention of a Probate Court in Massachusetts recently. A man died leaving a will which divided his property equally between his wife, his child, and a child then unborn. The unborn party proved to be twins, and the executor is sorely perplexed as to whether he shall give each of the twins one-sixth of the estate, or whether he shall carry out the testator's purpose to serve all the children alike, by giving them and the widow each one-fourth, or whether, again, he shall give the widow her third, and divide the other two-thirds among the three children. The case being wholly without precedent in this State, the court gave the executor no advice, and the conundrum is to be brought before the Supreme Court.—*Albany Law Journal.*

If police justices have not a reputation for childlike innocence in American cities, it is certain that some of them in England deserve to have such reputation. At the Salford Police Court, one Cunningham was charged with gambling on the race-course. Detective-Sergeant Eyre stated that he saw prisoner and other men playing what was known as the "three-card trick" with playing-cards on the race-course. Mr. Bennet, counsel for the defense, contended that the "three-card trick" was a game of skill and not a game of chance, because if the eye was sufficiently educated to follow the player's hand the selected card could be detected. Cases of this kind had been brought before Sir J. I. Mantell, who considered that the game was one of skill, and dismissed the prisoners. Some years ago he (Mr. Bennet) defended a person who was charged with a similar offense before Sir J. I. Mantell. At his (Mr. Bennet's) request the prisoner was brought out of the dock, placed near Inspector Lythgoe, and allowed to manipulate the cards. On three different occasions the inspector detected the "marked" card. It was, therefore, decided by the stipendiary that the game was one of skill, and he dismissed the case. Mr. Radford said that in the face of recent decisions he should follow the course adopted by the stipendiary. He thought, however, that gambling ought to be better defined, so that the law might reach cases of this description. The case was therefore dismissed.

I doubt if anybody in the world except a British country magistrate would have thought such a test of the innocence of the "three-card trick" satisfactory.—*Albany Law Journal.*

Clerical justices have not, as a rule, proved a success, but the Rev. Sydney Smith was an exception, according to the following sketch which we find in the *Washington Law Reporter*: "He set vigorously to work to study Blackstone, and made himself master of as much law as possible, instead of blundering on as many of his neighbors were content to do. Partly by this knowledge, partly by his good humor, he gained a considerable influence in the *quorum*, which used to meet once a fortnight at the little inn, called the Lobster House; and the people used to say they were "going to get a little of Mr. Smith's lobster sauce." By dint of his powerful voice and a little wooden hammer, he prevailed on "Bob" and "Betsy" to speak one at a time; he always tried, and often succeeded in turning foes into friends. Having a horror of the game laws, then in full force, and knowing, as he states in his speech on the reform bill, that for every ten pheasants which fluttered in the wood one English peasant was rotting in jail, he was always secretly on the side of the poacher (much to the indignation of his fellow magistrates, who in a poacher saw a monster of iniquity), and always contrived, if possible, to let him escape rather than commit him to jail, with a certainty of his returning to the world an accomplished villain. He endeavored to avoid exercising his function as a magistrate in his own village, when possible, as he wished to be at peace with all his parishioners. Young delinquents he could

never bear to commit; but read them a severe lecture, and in extreme cases called out, "John, bring me my *private gallows!*". which infallibly brought the little urchins weeping on their knees, and "Oh! for God's sake, your honor, pray forgive us!" and his honor used graciously to pardon them for this time, and delay the arrival of the private gallows, and seldom had occasion to repeat the threat.—*The Irish Law Times.*

The authorship of the phrase *Fiat justitia, ruat cælum*, has been the subject of much controversy. It is supposed to have been first used by Lord Chief Justice Mansfield when he gave judgment reversing the outlawry of Wilkes. We have recently come across what we believe to be the earliest, if not the first use of these memorable words in a pamphlet published in 1647, entitled "The Simple Cobbler of Aggawam, in America," where it is said at p. 13, "It is less to say *Statuatur veritas, ruat regnum*, than *Fiat justitia, ruat cælum.*"—*Athenæum.*

The Law of Nations.—The recent meeting of the Association for the Reform and Codification of the Law of Nations, at Antwerp, was, notwithstanding the troubled condition of Europe by reason of the war between Russia and Turkey, in every sense of the word, a successful one. The opening address was delivered by Lord O'Hagan, who gave an interesting summary of the progress of the movement inaugurated by the society, and spoke flatteringly of the condition of the society and its future prospects. As the Association is of American origin, we feel in this country a very deep interest in its well being, and the statements made by Lord O'Hagan will be carefully read with pleasure by every one of us. It will be remembered that the idea of the Association was suggested by the Washington Treaty and the Geneva Arbitration; that, in consequence of the favour with which it was received by leading men in this country, Dr. Miles went to Europe to submit the project for such an association, and communicated with persons of learning, ability and position in various countries, who received him with respect, and advised an attempt at permanent organization. It was proposed to hold the first meeting in New York, but, as many who had actively favored the plan could not take a journey to that place, it was ultimately resolved that such meeting should be convened at Brussels, where it was held October 10, 1873. Four annual meetings have been since held, one at Geneva, one at The Hague, one at Bremen, and the recent one at Antwerp. The growing strength of the Association is indicated by an increase in membership from ninety, when the meeting at The Hague was held in 1875, to five hundred and thirty at the time of the last gathering. These members are, as a rule, representative men of established reputation as jurists and politicians in the various civilized nations of the world. The attendance of Americans at the Antwerp conference was not as large as usual, which is perhaps not to be regretted. The representation of the English-speaking people has been heretofore disproportionately great. While it is true that Great Britain and the United States are at present more concerned than any other nation in the settlement of many international questions, the continental nations have also large interests in the matter, and should be allowed to take a more prominent part than they hitherto have in the direction and the discussions of a society that is designed for the benefit of the whole world.—*Albany Law Journal.*

RECENT JUDICIAL APPOINTMENTS.

As we go to press we learn that Mr. Justice Moss has been placed at the head of the Court of Appeal, Mr. Justice Morrison taking the vacant seat in that Court. Mr. J. D. Armour, Q.C., has been made a puisnè judge of the Court of Queen's Bench. It is a serious question whether it was desirable to place so young a man and a judge of such recent date as Mr. Moss, in the position rendered vacant by the death of Chief Justice Draper. It was thought by many, and we confess we inclined to that opinion, that for reasons which we have not space to enlarge upon, the appointment of the Chancellor might have been preferable; whilst the Court would undoubtedly have been much strengthened by the appointment of Mr. Hagarty as Chief, Mr. Moss retaining his present position. But of Mr. Moss's abilities there have never been two opinions, and in common with his many friends, we congratulate him upon the high position he has obtained. Mr. Armour is not so well known, but his legal acquirements and mental capacity are of a very high order, and his appointment is an excellent one.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Trinity Term, 41st Victoria.

DURING this Term, the following gentlemen were called to the Bar:—

James Vernal Teetzel.
Lyman Davis Temple.
Alfred H. T. Marsh.
Thomas Gibbs Blackstock.
Duncan Byron McTavish.
J. Wilmot Gordon.
Erastus Blair Stone.
James Henry Madden.
John Crerar.
J. Alexander McGillivray.
Wm. Seton Gordon.
Frederick Montye Morson.
Charles Wesley Peterson.
Henry Auber Mackelcan.
Edward H. Tiffany.
T. Mercer Morton.
Charles Stephen Jones.
Elias Talbot Malone.
David Steele.
Philip Sanford Martin.
John Secord.
J Melbourne Kilbourne.

The following gentlemen, members of the English Bar, were admitted and called.

Richard Willis Jameson.
Isidore J. Hellmuth.

The following gentlemen received Certificates of Fitness:

Duncan B. McTavish.
J. Alexander McGillivray.
Alfred H. Marsh.
Lyman Davis Temple.
Charles Wesley Peterson.
Peter Clark McNee.
Wm. Seton Gordon.
Charles Stayner Wallis.
Luther Kendal Murton.
John McSweyn.
Daniel Spencer McMillan.
David Steele.
Robert Shaw.
Thomas William Howard.
E. D. McMillan.
John Hind Hegler.
James Crowther, Jr.
John William Hector.
Henry Mortimer East.

And the following gentlemen were admitted into the Society as Students-at-Law:

Graduates:

Walter Taylor Briggs, B.A., Trinity College.
Richardd Wornall Wilson, B.A., Victoria College.
George Beavers, B.A., Victoria College.
Edward Addison Emmett Bowes, B.A., University of Toronto.
Edward Betley Brown, B.A., University of Toronto.
Jacob Edward Lees, B.A., University of Toronto.
William Nesbitt Ponton, B.A., University of Toronto.
Paulus Æmilius Irving, B.A., Trinity College.
Alexander McBeth Sutherland, B.A., University of Toronto.

Matriculants:

Ernest Edward Kitson, University of Toronto.
James Martin Ashton, Albert College.
David Barker Stevenson Crothers, Albert College.

Junior Class:

Charles Oliver.
Arthur Virgil Lee.
Wm. Frederick Williams.
Charles Joseph Leonard.
Walter Allan Geddes.
Collin Gregor O'Brien.
Augustine Foy.
John Christie
William Bannerman.
Patrick Sarsfield Carroll.
Alexander Armstrong Hughson.
Robert McGhee Flood.
Wm. Evans Scott.
Frank Howard King.
J. Johnston Anderson Weir.
Loftus Edwin Dancey.
Samuel E. T. English.
Edward Arthur Lancaster.
Robert Alexander Portbous.
Francis Patrick Ford.
J. Rymal Taylor.
George Taylor Ware.
Robert George Barrett.

Ordered, That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission as Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects:—

CLASSICS.

Xenophon Anabasis, B. I.; Homer, Iliad, B. I. Cicero, for the Manilian Law; Ovid, Fasti. B. I., vv. 1 300; Virgil, Æneid, B. II., vv. 1-317, Translations from English into Latin: Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of quadratic equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; An examination upon "The Lady of the Lake," with special reference to Cantos v. and vi.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar. Translation of simple sentences nto French prose. Corneille, Horace, Acts I. and II.

or GERMAN.

A paper on Grammar. Musæus, Stumme Liebe Schiller. Lied von der Glocke.

Candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), are required to pass a satisfactory examination in the following subjects:—

Ovid, Fasti, B. I., vv. 1-300,—or
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

A Student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk, (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

All examinations of Students-at-Law or Articled Clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

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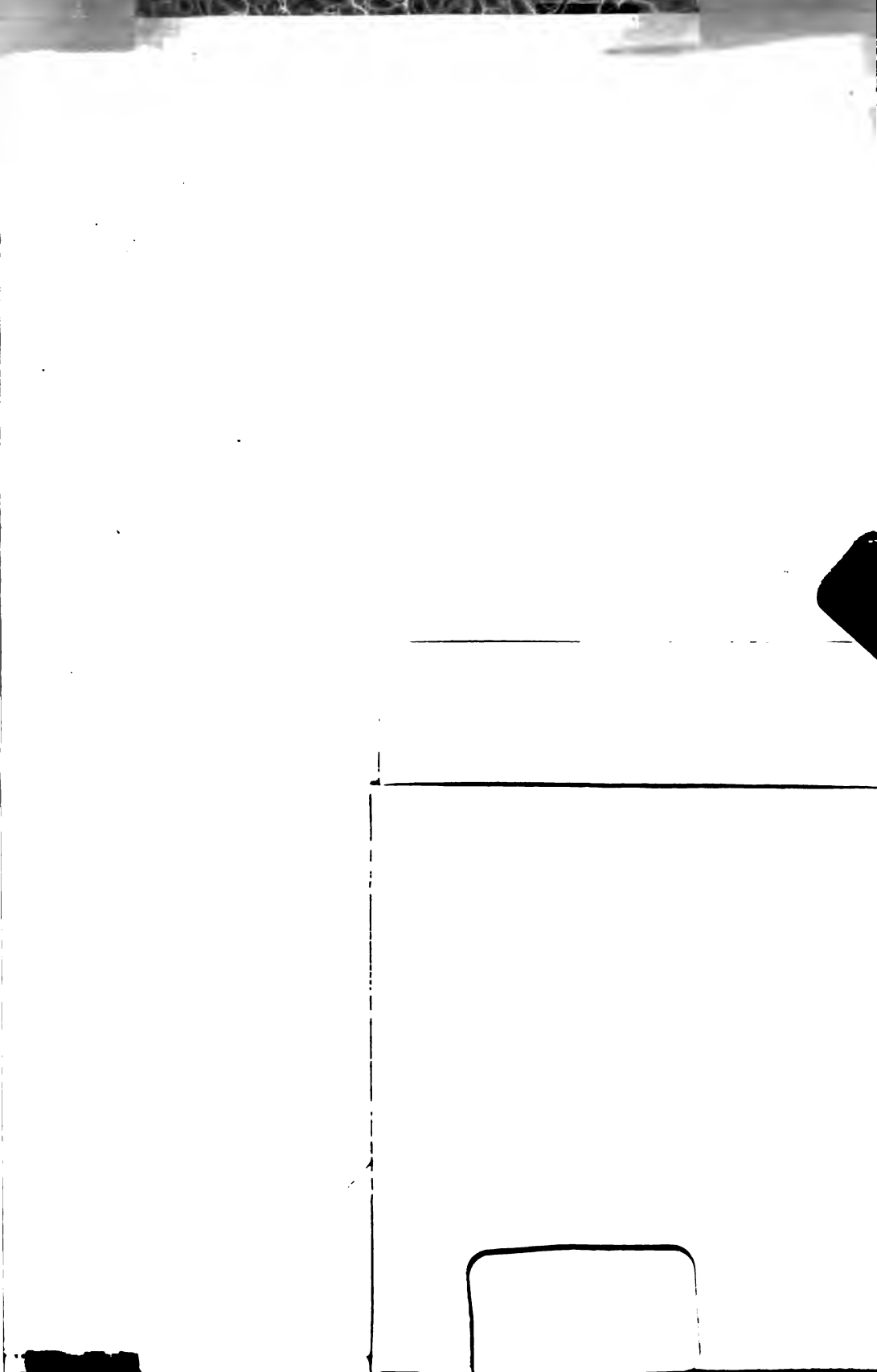
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